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REPORTS OF CASES

ARGUED AND DETERMINED

---

IN THE SUPREME COURT,  
ETC., ETC.





# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

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BY ISAAC BLACKFORD, A. M.,  
ONE OF THE JUDGES OF THE COURT.

SECOND EDITION; WITH ANNOTATIONS,  
BY EDWIN A. DAVIS.

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VOL. III.

CONTAINING THE CASES FROM MAY TERM, 1832, TO  
NOVEMBER TERM, 1834, BOTH INCLUSIVE.

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# J U D G E S

OF THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

---

ISAAC BLACKFORD, Esquire.

STEPHEN C. STEVENS, Esquire.

JOHN T. M'KINNEY, Esquire.



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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1832, IN THE SIXTEENTH  
YEAR OF THE STATE.

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M'MAHAN *v.* KIMBALL.

**DOWER IN EQUITABLE ESTATE.**—The wife of a *cestui que trust* is not dowerable, by the *English* law, of an estate to which her husband had only an equitable title during the coverture; nor is a widow dowerable, by that law, of an estate mortgaged *in fee* by her husband before marriage, and which was unredeemed at his death.

**STATUTE CONSTRUED.**—The *Indiana* statute has materially changed the law on this subject. The widow is here entitled to dower in “all the lands, tenements, and hereditaments, either legal or *equitable*, whereof her husband or any other person to his use, was seised at any time during the coverture;” and she has, consequently, a right of dower in an equity of redemption on a mortgage *in fee* (a).

**SAME.**—The clause in the statute, saying that the widow’s dower shall not be considered as sold or extinguished, by a sale of her husband’s property by virtue of any decree, execution, or mortgage, to which she is not a party, has no relation to a decree, &c., existing previously to the marriage (b).

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(a) Tenancies by curtesy and in dower are abolished by statute. See 1 R. S. (G. & H.) p. 294, § 16.

(b) Widow can only bar her dower by conveyance duly acknowledged and delivered. *Bank v. Hanna et al.*, 6 Ind., 20.

## M'Mahan v. Kimball.

**DOWER—MORTGAGE.**—A person having executed a mortgage *in fee* on his estate married, and afterwards died without having redeemed the mortgage. Two of the three payments to secure which the mortgage was given, were due and unpaid at the time of the mortgagor's death. The widow caused her dower in the estate to be assigned to her, by a commissioner, under the statute. The mortgagee filed a bill in chancery against the heir and personal representative of the mortgagor, for a foreclosure and sale of the mortgaged premises; and a decree was rendered for the com-  
 [\*2] plainant by an agreement of the parties. This decree required \*that the premises should be exposed to sale by a commissioner according to law, and that, if they would not sell for a sufficient sum to pay the mortgage-money and costs, they should be delivered to the mortgagee in full satisfaction of the debt. The commissioner, afterwards, not being able to sell the premises for a sufficient sum to pay the mortgage-money, conveyed them to the mortgagee, according to the direction of the decree. *Held*, that the widow of the mortgagor was not, under these circumstances, entitled to dower in the premises.

**SAME.**—The claim of a widow to dower in an equitable estate, under the statute, can be enforced only by a suit in chancery.

**EFFECT OF ASSIGNMENT.**—The assignment of dower by commissioners, under the statute, limits the extent of dower, but does not confer a legal right to it (c).

APPEAL from the *Washington* Circuit Court.

**M'KINNEY, J.**—The appellee declared in disseisin, claiming the possession of a lot of ground in the town of *Salem*, it being a part of in-lot numbered four, with the buildings and improvements thereon, of which she was, on the — day of —, 1829, seised and possessed in her own right, &c., as of dower as the widow of *Nathaniel Kimball*, deceased; that the defendant entered thereon, and disseised her, &c. To this declaration the defendant pleaded not guilty. Verdict of guilty, and damages assessed at seventy-five dollars. Judgment on the verdict; and the writ of *habere facias possessionem* awarded.

A bill of exceptions, taken by the defendant, presents all the evidence offered to the jury. This evidence is voluminous. The greater part consists of the proceedings had in the Circuit Court, on the application by the plaintiff for the assignment of her dower in the estate of her deceased husband, *Nathaniel Kimball*, and of the proceedings in chancery upon a bill filed



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M'Mahan v. Kimball.

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by *Haggarty* and *Austin* to foreclose a mortgage executed to them by said *Kimball* for the lot, a part of which is claimed by the plaintiff in this action. We will present a summary of this evidence in as condensed a form as practicable, in order the more fully to examine the ground upon which the parties respectively stand.

The plaintiff offered in evidence, 1st, a deed from *Edward Carvin* and wife to *Nathaniel Kimball* for the lot in controversy; 2d, a record of the marriage of *Nathaniel Kimball* to the plaintiff on the 13th day of *April*, 1828; 3d, a record of her application to the Circuit Court on the 14th day of *September*, 1829, for the appointment of commissioners to assign her dower in the lot claimed—the proceedings had on such application,

[\*3] embracing at large the petition, the appointment by the Court of \*commissioners, their report, and its adoption by the Court, assigning and setting over to the applicant by metes and bounds the part of the lot claimed in the declaration; it further shows that *Haggarty* and *Austin* moved the Court to set aside the order appointing commissioners, and objected to the reception of the report for reasons filed, and offered proof in support of the same, which was rejected by the Court, and an exception taken to its opinion; 4th, the plaintiff also proved that the defendant, at the time of the institution of this suit, was in possession of the premises in dispute, a demand and refusal to deliver possession, that they were worth ninety dollars a year; further, that *Nathaniel Kimball* died in the possession of the same by tenant, and had had possession from the date of the deed to him from *Edward Carvin* and wife.

The defendant then introduced the following evidence: 1st, a mortgage executed on the 13th day of *July*, 1827, by *Nathaniel Kimball* to *Haggarty* and *Austin* for the lot, a part of which is claimed by the plaintiff, for the consideration of \$3,000 (a previously existing debt), to be paid in three equal annual installments from the 6th day of *November*, 1826, with legal interest thereon, payable every sixty days in advance; 2d, a record of a suit in chancery brought by *Haggarty*

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M'Mahan v. Kimball.

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and *Austin*, after the death of *Nathaniel Kimball*, against the heir and personal representatives of said *Kimball*, to foreclose the above mortgage; the decree rendered by agreement between the complainants and the guardian of the heir and the personal representatives of the deceased, which, among other things, required the mortgaged premises to be exposed to sale according to law by the sheriff of *Washington County*, who was appointed a commissioner; that all costs were first to be paid, and then the debts due to the mortgagees; that if the premises did not sell for a sufficient sum to pay the debt, costs, &c., they were to be delivered to the complainants in full satisfaction of all debts against the estate of the decedent. The record further shows that the premises did not sell for the debt, &c.; that agreeably to the decree they were delivered to the mortgagees and accepted by them, and that they received a deed for the same from the commissioner. It further appears that during the pendency of the suit, *Elmira S. Kimball*, the widow of *Nathaniel Kimball*, appeared in court, made oath that she was the widow of the deceased, and that she believed

[\*4] herself entitled to dower \*in the lot, and moved the Court to dismiss the suit for want of parties; and that this motion was overruled; 3d, a deed from *Haggarty* and *Austin* to *John M'Mahan*, defendant, for the lot in controversy.

From the evidence, it appears that *Nathaniel Kimball* died on the 12th day of *January*, 1829; that prior to his marriage to the appellee, a forfeiture of the condition of the mortgage occurred by the non-payment of \$1,000, one of the installments stipulated to be paid; that prior to his death a second installment became due; that neither of these installments was paid at the time of his death. The defendant then moved the Court to instruct the jury as follows:

1st. That the plaintiff, in order to maintain this action, must show herself entitled to a legal estate in the premises in dispute; and that if she has no more than an equitable estate, she can not maintain this action.

2d. That if the jury believe, from the evidence, that *Nathaniel Kimball* was formerly the owner of the lot in dispute,

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M'Mahan v. Kimball.

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and being such owner mortgaged the same, and afterwards married said plaintiff and died, the mortgage still unsatisfied, in that case the said plaintiff, as the widow of *Nathaniel Kimball*, is entitled to dower only in the equity of redemption of said lot, and can not recover possession of said lot against a holder of the same under said mortgage, unless said lot shall have been previously redeemed: which the Court refused to give; but instructed the jury, that the legal title to all real estate remains in the mortgagor until entry by the mortgagee, and that the right of the widow of the mortgagor to dower can not be defeated by a sale of the mortgaged premises of her deceased husband, whether the mortgage be made prior or subsequent to the marriage.

3d. That if the jury find a forfeiture of any of the conditions of the mortgage, prior to the marriage of the plaintiff to said *Nathaniel Kimball*, all the right which said *Kimball* or his heirs had to said lot was an equity of redemption; and that, consequently, the plaintiff could have no greater right; and that an equity of redemption was not such a title as would enable the plaintiff to recover in this action.

4th. That if they should find that previous to the marriage of the plaintiff to *Nathaniel Kimball*, he, *Nathaniel Kimball*, had by mortgage duly executed and recorded, conveyed [\*5] the said \*premises to said *Haggarty* and *Austin*, and that a forfeiture of the mortgage or any part thereof had taken place, the legal estate in said mortgage had thereby been divested out of the said *Kimball* and vested in the mortgagees, the said *Haggarty* and *Austin*, and their assignee, the said *John M'Mahan*.

5th. That to entitle the plaintiff to recover in this case, they must find that she is vested with the legal estate in the premises, or that her husband was entitled at some time during the coverture, or that he was vested with an equitable title thereto, not subject to any defeasance.

6th. That if the jury find that the estate of the husband was subject to a defeasance by mortgage or otherwise, which occurred previous to the marriage, the wife takes the said

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M'Mahan v. Kimball.

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estate subject to such lien, defeasance, or mortgage, which would bar the estate of the husband.

7th. That if they find that the said *Haggarty* and *Austin*, or *Nathaniel Kimball*, the infant son and heir of the said *Nathaniel Kimball*, deceased, were not duly notified of said proceeding assigning dower, and not made parties to the record, they or either of them are not concluded thereby, and they are at full liberty to contest the same in this suit.

8th. That if they find that the estate of the husband was subject to a defeasance or lien, accruing previous to the time of the marriage, whereby the same would be liable to be defeated or barred, the wife marrying under such circumstances takes the estate subject to such defeasance or lien, and is subject to be barred thereby in like manner.

9th. That to entitle the plaintiff to recover in this case, they must find that her husband at some time during the coverture, was vested with a legal estate in the premises, or an equitable interest therein not subject to a defeasance.

10th. That after the happening of the forfeiture upon the said mortgage in *November*, 1827, the interest of the said *Kimball*, the mortgagor, was completely thereby divested, and he could not become re-invested therewith, until he should have paid the amount of the said forfeited money, and saved the equity of redemption in said lot; and that the said plaintiff can not entitle herself to any part or interest therein, until she shall have contributed her proportion of one-third of such forfeited sum.

[\*6] \*11th. That if the jury find that the plaintiff has any interest at all in the premises in dispute, it can not be the subject of a suit at law, but only of a proceeding in equity.

12th. That the proceeding assigning dower is a summary proceeding authorized by statute, and confers no legal right to the complainant.

13th. That if they find the husband was not possessed of such an interest in the premises as would have been sufficient to have maintained an action of ejectment or disseisin, the wife,



deriving her claim of dower through her husband, can not sustain this action.

The Court gave the 1st, 9th and 13th instructions, and the charge following the 2d; and refused the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 10th, 11th and 12th. To which decision the defendant excepted.

The action of disseisin is given by the act of 1824, and appears to have been intended as a substitute for the action of ejectment. It is more summary and without the fiction of the action of ejectment, but rests the plaintiff's recovery, as in that action, upon a legal title. Many interesting and important questions arising from the testimony offered, the instructions asked and refused to be given, and the construction of the statute relative to dower, are before us. Some of these questions assume additional interest, not only from the fact of their being for the first time before this Court, and of a conflict in their settlement between the courts of some of our sister States, and of those of *England*, but from their possessing an intrinsic weight which must be sensibly felt in its action upon a large body of property. The claim of the appellee is of dower, and it is contended in support of the claim, that the provisions of the statute of 1824, relative to dower, give it in estates in which it was denied by the common law. If this construction be correct, it is obvious that an important change has been made in a branch of the law which has received the utmost consideration, and which, in its general bearing in civilized life, is felt in its most varied interests. It is therefore our duty to examine if this construction be correct, and to what extent the legislature intended its enactment should reach. In doing this, it would seem proper, before we examine the statute, to advert to the common law, the broad foundation of our statutory provisions. Dower, at common law, is thus

[\*7] defined:—"When a \*man is seised of an estate of inheritance and dies in the lifetime of his wife, she is entitled to be endowed, for her natural life, of the third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any

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issue which she might have had might by possibility have been heir." 4 Kent's Comm., 35; 2 Bl. Comm., 129. The various branches of this definition are explained by these authors in their accustomed lucid manner, and are the subjects of adjudications, all tending to unfold and impress upon it that which is so necessary in the administration of law, certainty and conformity to policy and reason. Our attention will be directed to such parts only of the definition as appear strictly applicable to the case before us.

The right to dower is viewed with peculiar favor by courts both of law and equity, and is regarded not only as a legal and equitable right, but as a moral right. But although it is thus recommended to the protection and favor of courts, it would seem inconsistent with the principles of law that this protection and favor should be shown to the disregard and prejudice of the rights of others. The regard thus shown is not exclusive. It is qualified by the conflicting interests of others to which it is properly subject. Infants are also the peculiar care of courts. But in extending that care, as in the protection of dower, it is manifest that no court, under the responsibility of its guardianship, can wrongfully strip one class of litigants to provide for the wants and necessities of another. There are particular estates upon which the right of dower attaches. When that right has once attached to a legitimate subject, it can be divested neither by the act of the husband nor by the act of a third person. It can only be waived or transferred by the party in whom it exists. The right to dower is derivative. It is based on the marriage, and, as its incident, attaches itself to the estate of the husband. It can not strike from an estate pre-existing rights and liens, or hold subject to its enjoyment the vested rights of others; nor can it enlarge the estate to which the husband himself was entitled. It is palpable, in the abstract, as well as in the operation of a particular rule, that a right derived can not transcend the limits of its source, or encircle itself with powers and attributes that did not pertain to its source.

With these general positions, deducible from the books, we

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will return to the examination of the common law, and \*present some of the doctrine on this subject.

[\*8] The wife was entitled to dower when her husband died seised, either in deed or in law, of an estate of inheritance, &c. She was therefore entitled to dower of lands of which the husband died seised in fee simple or fee tail. The husband must further be seised of a freehold in possession, and of an estate of immediate inheritance in remainder or reversion; and the freehold and inheritance must be consolidated and be in the husband *simul et semel* during the marriage, to render the wife dowable. 4 Kent's Comm., 39. The seisin required must be accompanied by a beneficial interest. The seisin for an instant is not sufficient. In the commentaries of *Kent* and *Blackstone* are cases in illustration of the rule, as, "when the same act that gives the estate to the husband conveys it out of him, as in the case of a conusee of a fine;" "when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money in whole or in part." In these cases the wife is not entitled to dower. 4 Kent's Comm., 38; 2 Bl. Comm., 131. Nor does dower attach to the wife of a vendee, the purchase-money not being paid, nor the vendor's lien discharged. Sugd. on Vend., 352; 6 Ves., Jr., 95; 1 Johns. Ch. R., 308. Nor would it attach on a conveyance, common with us and substituted for the conveyance by fine, which occurs when a man and his wife make a conveyance to a third person of land belonging to the wife, with the view by an immediate re-conveyance to the husband to vest in him the fee-simple.

The wife of a trustee is not entitled to dower in the trust estate, any further than the husband had a beneficial interest therein; nor is the wife of a *cestui que trust* dowable in an estate to which her husband had only an equitable and not a legal title during the coverture. Nor is a widow dowable of an equity of redemption. 4 Kent's Comm., 43; 2 Pow. on Mort., 688. The same rule, says Chancellor *Kent*, prevails as to an equity of redemption in an estate mortgaged in fee by the husband before his marriage, and not redeemed at his

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death. In the case of *Banks v. Sutton*, 2 P. Wms., 719, Sir *Joseph Jekyll*, the master of the rolls, in an elaborate opinion, laid down a different rule in relation to the right of dower in an equity of redemption, but succeeding chancellors, Lords [9] *Thurlow* and *Redesdale*, and their successors, have shown the fallacy of the arguments upon which that decision was bottomed, and for more than a century it has not been regarded as the law of *England*. In *Curtis v. Curtis*, 2 Ves., Jr., 124; *Williams v. Lambe*, 3 Bro. C. C., 263, and in *D'Arcy v. Blake*, 2 Sch. & Lef., 388, the doctrine is successively holden, that the widow can not have her dower out of any estate in which her husband had not the legal fee; that it is a mere legal demand; and that equity ought not to create the right where it does not subsist at law. And Lord *Thurlow* remarked, in the second case cited, "that if it turned out that the mortgage being in fee was made before marriage, there would be an end of the widow's claim of dower." These decisions sustain the doctrine in the commentaries cited, and are accordant with the text in 2 Pow. on Mort., 700.

If, then, agreeably to the common law, a widow be not dowerable of an equity of redemption, or of an estate mortgaged in fee by the husband before marriage, and not redeemed at his death—that the right of dower does not enlarge or change the quality of the estate of which it is claimed, nor interfere with the vested rights of others—it is obvious that, to enable the plaintiff to recover in this action, the statute must have changed not only the common law in giving to a widow dower in an equity of redemption, but have also converted an equitable into a legal estate.

Recurring to the testimony, it appears that *Nathaniel Kimball*, nearly a year before his marriage to the appellee, being seised in fee simple of a lot of ground, executed a mortgage for the same to *Haggarty* and *Austin*; and that prior to his marriage a forfeiture of the condition of the mortgage took place, by the non-payment of \$1,000, one of the installments stipulated to be paid; that prior to the death of *Kimball* a second installment became due; and that neither of the installments



was paid at the time of his death; that the mortgagees, after his death, filed a bill of foreclosure, and that by an agreement between them and the guardian of the heir and the personal representatives of said *Kimball*, a decree of foreclosure was rendered and the land offered for sale; that not selling for the mortgage-money, interest and costs, it was conveyed to the mortgagees by a commissioner appointed by the Court, and subsequently conveyed to the appellant, who was immediately put into possession of the same.

[\*10] \*By the *English* law, in a case such as the present, the widow would not be entitled to dower. If she enjoys that right here, it must be by virtue of the statute. It reads as follows: "The widow of any person dying intestate or otherwise, shall be endowed of one full and equal third part of all the lands, tenements and hereditaments, either legal or equitable, whereof her husband or any other person to his use was seised at any time during the coverture; and the dower of such widow shall not be considered as sold or extinguished by a sale of her husband's property, by virtue of any decree, execution, or mortgage."

The statute certainly changes the common law, but not to the extent we think contended for by the counsel for the appellee. A widow, by the statute, is entitled to dower of the land, &c., either legal or equitable, whereof her husband or any other person to his use was seised at any time during the coverture. She is thus entitled to dower of an equitable and trust estate, the beneficial interest in which belonged to her husband. No other change, conflicting with the rules of the common law to which we have adverted, appears to have been made. The right is given, but it was intended to have been given, and must be so regarded, as subject to all incumbrances and liens previously existing. This appears to be the only reasonable construction of which the statute is susceptible. The latter clause, "and the dower of such widow shall not be considered as sold or extinguished by a sale of her husband's property, by virtue of any decree, execution, or mortgage," relates to the protection of her right when it has attached as a

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present and existing right. It can not add to the right by relation back to a period, when the estate in which it was claimed was without encumbrance. In this there is no departure from the common law; and were we to say that the legislature intended otherwise, we should ascribe to it the exercise of a power denied by the constitution. As was well remarked by the counsel for the appellant, the act has not provided that the widow of *A.* shall be endowed of the property of *B.*

The appellee was, by virtue of this act, dowable of an equitable and trust estate, of which her husband or any other person to his use, was seised at any time during the coverture. In prosecuting the inquiry it may here be asked, what estate in the lot had *Nathaniel Kimball* during the coverture? [\*11] for, \*reiterating a former position, it is demonstrable that the interest of his widow is limited to that which he himself enjoyed. By his deed of mortgage, he had conveyed all his right and title to *Haggarty* and *Austin*, subject to the condition in the mortgage. He thus divested himself of the legal title, and was left with no other interest than an equity of redemption. Of this he was possessed at the time of his marriage to the appellee, and during the period of coverture. The appellee then can only be entitled to dower in an equity of redemption. The construction we have given the statute, is accordant to that given to a similar statute in *Virginia*. *Claiborne v. Henderson*, 3 Hen. & Munf., 322; 2 Tuck. Black., 128, 131, and notes.—*Heth v. Cocke*, 1 Rand. Rep., 344. In the latter case it was decided, that a widow is not entitled to dower of real estate mortgaged by the husband before marriage; but that she was entitled to be endowed of the equity of redemption.

In the several States of the Union, as remarked, there is a conflict in their adjudications upon this subject. But it must be observed, that in those States in which dower is allowed to the widow in an equity of redemption, it is subject to the qualifications to which we have adverted, and which we regard as applicable to the case before us. Thus in *New York*, in *Coates v. Cheever*, 1 Cow. R., 460, it is said, "that though a widow is

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in general entitled to dower in that State in an equity of redemption, yet when the tenant enters upon the land by virtue of a foreclosure, or after a forfeiture for the non-payment of the money, then the estate is deemed never to have vested in the husband, and the widow is not entitled to dower. In *South Carolina* and *Massachusetts*, a widow is not entitled to dower of lands mortgaged before the marriage, until she has redeemed the mortgage. *Crafts v. Crafts*, 2 M'Cord's Rep., 54; *Bolton v. Ballard*, 13 Mass. R., 227; nor unless redeemed by the husband in his lifetime, or by his representatives and herself after his death. *Hildreth v. Jones*, 13 Mass. Rep., 525; *Gibson v. Crehore*, 5 Pick. Rep., 146. In *Pennsylvania*, the widow is dowable of land mortgaged before marriage, but the right is subject to the mortgage. 2 Serg. & R., 554. In *New Jersey*, dower can not be claimed of land mortgaged before marriage. 1 South. R., 260. The right of redemption exists not only in the mortgagor, but in his heirs and personal representatives, and every other person who has an interest [\*12] in or an equitable \*lien upon the lands, &c. But the redemption must be of the entire mortgage and not by parcels. He who redeems must pay the whole debt, and he will then stand in the place of the party whose interest in the estate he discharges. 4 Kent's Comm., 163.

Regarding then the statute as extending the right of dower to an equitable or trust estate, we think the appellee was entitled to dower in the equity of redemption, at the time of the death of *Nathaniel Kimball*; that this right was subject to the pre-existing rights of *Haggarty* and *Austin*, the mortgagees; that the mortgage not being discharged by *Nathaniel Kimball* in his lifetime, nor by his heirs or representatives since his death, and the assignee of the mortgagees being in possession of the lot, by virtue of a deed in fee simple executed to him by the mortgagees, to whom the commissioner of the Circuit Court of *Washington County*, appointed to sell and convey on a foreclosure of the mortgage, had executed a deed—the appellee's right of dower in the equity of redemption by such foreclosure, has been barred.

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It would appear to have been contended, that error had intervened in the several proceedings of record, forming a part of the evidence submitted to the jury in this case. Whether the mortgagees should have been parties to the application by the widow to the Circuit Court, for the appointment of a commissioner to assign or set over to her dower; or whether the Circuit Court, on the motion by *Haggarty* and *Austin* to set aside the report of said commissioner for the reasons they assigned, committed error, are questions which it is not thought are properly before us for decision. Nor can we thus, collaterally, decide upon questions presented in relation to the bill filed by *Haggarty* and *Austin* to foreclose the mortgage. Another question arises, is the title of the appellee legal or equitable? If equitable, should she not have resorted to a court of equity? The reasoning by which we have been brought to the conclusion, that by the statute the appellee is entitled to dower in the equity of redemption, appears to establish the right to be equitable, and as such appropriate to a court of equity. The cases of *D'Arcy v. Blake*, 2 Sch. & Lef., 388, and *Taylor v. M'Cracken*, in this Court, are decisive of this question. It would also seem to have been contended that the assignment of dower changed in some degree the character of the [\*13] appellee's claim. \*The title, however, is not changed by the assignment of dower. The assignment limits the extent of dower, but does not confer a legal right. *Coates v. Cheevers*, 1 Cow. R., 478.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*J. H. Farnham*, for the appellant.

*J. H. Thompson* and *I. Naylor*, for the appellee.



[\*14]

\*GWINN v. HUBBARD.

ESCAPE.—An action of debt lies in this State against a sheriff for an escape on execution; the *English* statutes authorizing such an action being in force here (a).

SAME.—The sheriff is liable for the escape of a party taken on execution in a civil action, and legally in his custody, though there be no gaol in the county.

CAPIAS.—A *capias ad satisfaciendum* can not be issued by the clerk of a Circuit Court, nor by a justice of the peace, unless a *fieri facias* be first issued and returned *nulla bona*, or an affidavit be made by the plaintiff that the debtor is about to leave the State, &c.

SAME.—A justice of the peace, having rendered judgment for a certain sum against a defendant, issued an execution thereon, commanding the constable to levy the amount of the defendant's goods, and, for want of goods, to take his body, &c. *Held*, that this writ gave no authority to the constable to arrest the defendant, nor to the sheriff to receive or detain him in custody.

APPEAL from the *Bartholomew* Circuit Court.

STEVENS, J.—On the 19th of *April*, 1830, the plaintiff recovered five several judgments against *Samuel Downing*, before a justice of the peace of the county of *Bartholomew*. On the 21st of *August*, 1830, a writ of execution issued on each judgment directed to a constable of the township, commanding him to levy the several judgments, set forth in the several writs, of the goods and chattels of *Downing*, but for want of property whereon to levy, then to take his body to the gaol of the county, and him deliver into the custody of the sheriff, there to be detained until payment should be made or he otherwise legally discharged. Which several writs came into the hands of the constable on the day of their date, and he, finding no goods or chattels, afterwards, on the 23d day of *August*, 1830, arrested *Downing* by his body on those writs, and delivered him, together with the writs, to *John C. Hubbard*, the defendant, he being then and there the sheriff of the county; who immediately afterwards, \*knowingly and wilfully, permitted the prisoner to escape and go at

(a) See *Hall v. Johnson*, *post*, 363; *The State ex rel., &c., v. Johnson et al.*, 1 Ind., 158

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large. The plaintiff brought an action of debt against the sheriff for the escape. To which action the sheriff pleads in justification, that, at the time *Downing* was delivered to him on those writs, there was no gaol in the county, and that the plaintiff well knew it. That the boards doing county business had neglected and refused to cause a gaol to be erected, although they had been several times, by the Circuit Court and grand juries of the county, requested so to do. And that because there was no gaol erected in the county, he did knowingly and wilfully permit the escape, as he lawfully might do. To this defence the plaintiff demurs, and the demurrer is overruled, and judgment rendered for the defendant.

Three points have been raised for the consideration of the Court.

The first is, whether the action of debt will lie in this State against a sheriff for an escape on the writ of *capias ad satisfaciendum*? By the common law debt only lies upon contracts. Escapes are considered torts, and are so treated by courts of justice. Hence, at common law, the remedy is an action on the case. The statutes of *West.*, 2, ch. 11 (13 Ed. 1), and 1 *Rich.*, 2, ch. 12, give the action of debt for escapes on the writ of *ca. sa.*, and if these statutes are in force here the action of debt lies. This State has adopted not only the common law of *England*, but also all the statutes in aid thereof, made prior to the 4th year of the reign of *Jac.* 1 (except the 2 sec. of the 6 ch. 43 *Eliz.*, the 8 ch. of the 13 *Eliz.*, and 9 ch. 37 *Hen.* 3), of a general nature and not local to that kingdom. Those statutes are affirmative; they take away no common law remedy, but add one, leaving the party at liberty to make his own election as to what remedy he will adopt, and are clearly in aid of the common law and in full force here. *Steere v. Field*, 2 *Mason*, 486; *Bonafous v. Walker*, 2 *T. R.*, 129; *Alsept v. Eyles*, 2 *Hen. Bl.*, 108.

The second point is, whether the sheriff is liable for escapes, until the county authorities have erected a gaol for the reception of prisoners? By the common law, each county has two prisons—one for the reception of criminals, furnished by the

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public and called public gaols, the other for the reception of debtors, furnished by the sheriff himself. The sheriff may appropriate his own house for that use, or he may furnish any other house he pleases in the bounds of his county; and the government is bound to indemnify him. He is bound at his peril to safely keep all such prisoners in safe custody, until the debt is paid or the prisoner otherwise legally discharged; and to enable him to do so, the whole means and power of the county are at his disposal. Nothing except public enemies, or the act of God, can release him from that obligation. *Smith v. Hillier*, Cro. Eliz., 167; 6 Bac., tit. sheriff, letter H., 5; *Day & Whittlesey v. Brett*, 6 Johns. Rep., 22; *Bartlett v. Willis*, 3 Mass. R., 86. The defendant rests his defence, in this particular, on the statutes which require the boards doing county business in the several counties to cause a court house, gaol, and other public buildings, to be erected in their respective counties as soon as convenient. He insists that these statutes have taken the power and responsibility out of the sheriff's hands, and given them to these boards; and that the sheriff is no longer liable. In *South Carolina*, in the case of *Smith v. Hart*, 2 Bay's R., 395, and in *Massachusetts*, in the case of *Burrell v. Lithgow*, 2 Mass., 526, where there are statutes similar in substance to ours, it was held that although the public authorities may have erected prisons, yet if the prisoners escape by reason of the insufficiency of the prison, the sheriff is liable, he being bound to see and know that his prison was sufficient. By our statutes, the time of erecting those public buildings is left entirely to the discretion and convenience of those boards, without any provision for the detention of prisoners until the public prison may be erected. It can not be presumed that the legislature intended that no person should be imprisoned, until it might suit the convenience of the county authorities to erect prisons. The record in this case shows that there was no public prison in the county in which the prisoner could have been detained; and, in such cases, the Court thinks it is very clear that the common law governs. The sheriff ought to have furnished a

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prison, and detained the debtor in close custody until the debt was paid or the prisoner otherwise legally discharged, if he was legally in his custody as such debtor.

The third point is, whether this commitment was legal or illegal. By the act of 1824, and the amendatory act of 1825, respecting the writs of execution, it is provided that no writ of *ca. sa.* shall be issued by the clerks of the Circuit Courts, until after a return of *nulla bona* to a *fi. fa.*, unless [17] the execution-\*plaintiff will make and file an affidavit that the judgment-debtor is about to leave the country. And by the 12th sec. of the act of 1825, it is provided that justices of the peace shall have full power to issue the writ of *ca. sa.*, on judgments rendered by them, under the same restrictions, rules and regulations, as are provided for the issuing similar writs by the clerks of the Circuit Courts. This is the only statutory provision, so far as it relates to justices of the peace and constables, that was at the time of this commitment in existence. The first natural branch of this point is the writs of execution, by which *Downing* was arrested and delivered to the sheriff. If these writs did not give any legal authority to arrest the execution-defendant, they gave no authority to the sheriff to hold him in custody. The first objection to the writs is, that they are double in their character. They appear upon their face to have been intended to have the force, operation and effect of a *fi. fa.* and a *ca. sa.* both. They first command the constable to levy the debt of the goods and chattels of the defendant; but for want thereof, to arrest him by his body and convey him to the goal of the county, and deliver him to the sheriff, &c. There is no such writ as this known to the common law. Our statute authorized no such writ; nor is there any sanctioned precedent to support the issue of such writ. Again, the statute is express that no *ca. sa.* shall issue until after a *fi. fa.* has issued, and a return of *nulla bona* is made thereto; unless an affidavit is made as above noticed. In this case, the *fi. fa.* and *ca. sa.* both issued at the same time, and were put into the officer's hands at the same time, if those writs can be construed into writs of *ca. sa.*



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The constable considered them as writs of *fi. fa.* and so treated them, for by his return he says, that he searched for goods and chattels and found none. We think they cannot be considered any more than writs of *fi. fa.*; and the officer should have returned them as such. They cannot be writs of *fi. fa.* and of *ca. sa.* at the same time; and as the law is positive that no *ca. sa.* shall issue until after the return of *nulla bona* to a *fi. fa.* or an oath made as aforesaid, they gave no legal authority to arrest the defendant.

*Per Curiam.*—The judgment is affirmed with costs.

*P. Sweetser*, for the appellant.

*C. Fletcher* and *H. Gregg*, for the appellee.

## [\*18] \*WASSON v. M. GOULD, Executrix, and Another.

ANSWER IN CHANCERY.—An answer in chancery acknowledged the receipt from the complainant, of an assignment of property in part payment of the defendant's demands against him; but the answer also stated that the defendant had afterwards cancelled the assignment. *Held*, that the defendant's statement in the answer, that the assignment had been cancelled, was no evidence for him of that fact (a).

[\*19] \*SET-OFF.—In a suit either at law or in equity against two partners, the individual demand of one of the defendants against the plaintiff is not a proper subject of set-off (b).

PAYMENT—APPLICATION OF.—When a payment in part of a demand is made, and the payment exceeds the interest then due, the payment is applied in discharge of the interest, and the surplus goes to the credit of the principal. But if the payment is less than the interest due, the principal remains on interest until payments exceeding the interest are made, and then the payments are applied as above mentioned (c).

THIS was a suit in chancery transferred from the *Sullivan* Circuit Court, in consequence of the interest of the Circuit Judge.

(a) See *Pierce v. Gates*, 7 Blackf., 162.

(b) See *Post*, 31; 8 Blackf., 193; 5 *id.*, 37, 46, 585; 13 Ind., 387; 4 *id.*, 283; 10 *id.*, 334.

(c) *Markel's Adm'r v. Spittler's Adm'r*, 28 Ind., 488.

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BLACKFORD, J.—An action at law was commenced in the *Sullivan Circuit Court* by *Mary Gould*, executrix of *Orchard Gould*, against *James Wasson* and *George A. Wasson*, surviving partners of the firm of *Wassons & Sayre*. The suit was founded on two promissory notes of \$1,000 each, payable to *Orchard Gould*, and on a demand for money lent by him to the firm of *Wassons & Sayre*. *James Wasson*, on whom alone the process was served, the other defendant being a non-resident, filed a bill in chancery against *Mary Gould*, executrix, and *George A. Wasson*. The bill prays a discovery; that an account be taken of the partnership concerns; and that the suit at law of *Mrs. Gould* be enjoined. The defendants filed their separate answers to the bill. It appears that *George A. Wasson* had conveyed his interest in several tracts of land, belonging to the firm of *James & George A. Wasson*, to *Mrs. Gould* as a collateral security for her demands against them; but that, during the pendency of this suit, those lands or their proceeds have come into the hands of *James Wasson*, by virtue of an order of the Circuit Court. The accounts between the parties were, by consent, referred for examination and adjustment to commissioners, appointed by the Court. At this stage of the proceedings, the cause was transferred to this Court, in consequence of the interest of the Circuit Judge. To the report of the commissioners, which has been recently made, the defendant, *Mrs. Gould*, makes several exceptions; and the cause is submitted by the parties, for a final decree upon the merits.

The first, third and fourth exceptions are to two separate charges against *Mrs. Gould* of \$350 each, and to one of \$218.80. The facts relative to these charges are the following: *George A. Wasson*, one of the firm of *James & George A.*

*Wasson*, was the owner in his own right and the [\*20] \*occupant of a house and two lots in the town of *Carlisle*. This property he sold to *Mrs. Gould* in her own right for \$500. Of the consideration-money, \$150 were applied to the payment of a debt due to *Mrs. Gould* from the vendor. For the remaining \$350 she gave him an

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order on Mrs. Wasson, resident in the state of *Connecticut*; which order was accepted and paid. Mrs. Gould afterwards gave her own note to Mrs. Wasson for this \$350; and the same, at Mrs. Wasson's death, constituted a part of her personal estate. By Mrs. Wasson's will, one-third of her real and personal estate was bequeathed to *George A. Wasson*; and he, directly afterwards, conveyed all his interest in the estate to Mrs. Gould, as a collateral security for the debt due to her as executrix, from himself and *James Wasson*.

According to this statement of the facts, Mrs. Gould must be considered liable for the one-third part of the personal, as well as for one-third part of the real estate of Mrs. Wasson, conveyed to her by *George A. Wasson*. The one-third part of the personal estate thus assigned, as stated by the commissioners, consisted of the note of \$350 executed by Mrs. Gould, and of the further sum of \$218.80. Mrs. Gould, it is true, alleges in her answer, that she afterwards cancelled this assignment of the personal estate. But, without stopping to examine the effect of the cancelling of the assignment, it is sufficient to observe that there is here no evidence of the fact. The cancelling of the assignment, after it had been received, is a distinct matter in avoidance, and of which fact the answer is no evidence. *Hart v. Ten Eyck*, 2 Johns. Ch. Rep., 62 (1). Besides, Mrs. Gould expresses in the answer her willingness to account for this personal property. The commissioners were therefore right in charging Mrs. Gould with the amount of the note of \$350, set apart by the will as a part of *George A. Wasson's* share of the personal estate of his mother; and with the sum of \$218.80, the residue of his share in that estate. The other charge of \$350 is evidently wrong. This mistake of the commissioners arose from their supposing that \$350 of the proceeds of the property at *Carlisle*, sold by *George A. Wasson* to Mrs. Gould, ought to be credited on the notes in her hands, as executrix, against *James* and *George A. Wasson*. No such credit, however, can be claimed by *James Wasson*. The house [\*21] and lots in *Carlisle* did not belong \*to the partnership.

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They were the individual property of *George A. Wasson*; and he had a right to sell them to whom he pleased.

There is an exception to a charge of \$200 against *Mrs. Gould*, which must be sustained. This charge is for personal property left with her by *George A. Wasson*, to whom alone it belonged. It is altogether unnecessary to inquire into the circumstances connected with this property. The subject belongs to the individual transactions between *Mrs. Gould* and *George A. Wasson*. This separate liability, if there was any, could not be a subject of set-off either at law or in equity, were *Mrs. Gould* suing the partnership for a demand in her own right. *Dale v. Cooke*, 4 Johns. Ch. R., 11: *a fortiori*, it cannot be a matter of set-off when she is claiming a debt from the partnership, due to her only in the character of an executrix

The last exception to the report, is as to the mode by which the commissioners have calculated the interest. They have permitted the notes and accounts due to the executrix to continue on interest, and have computed interest on the payments as they were successively made. This mode of computing interest, adopted by the commissioners, is not the correct one in cases like the present. It subjects the creditor to a loss that he ought not to bear. *Stoughton v. Lynch*, 2 Johns. Ch. R., 209. The following is the language of Chancellor *Kent* on this subject: "The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of principal as aforesaid." *The State of Connecticut v. Jackson*,



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1 Johns. Ch. R., 13. The rule of computing interest laid down in the case last cited, has been already adopted by a decision of this Court. *Harvey v. Crawford*, May term, 1827 (2).

We have changed the report of the commissioners, so as to make it accord with the principles which ought to govern this \*case. The result of our investigation of the various accounts and demands between these parties is, that the executrix is entitled to a decree against *James Wasson*, one of the surviving partners of the firm of *Wassons & Sayre*, for the sum of \$1,216.73.

We have not examined into the partnership accounts, existing between *James* and *George A. Wasson*, and referred to in the bill. They have not, in our opinion, any thing to do with the merits of the controversy between the executrix of *Orchard Gould* and the surviving partners of *Wassons & Sayre*. The bill, therefore, as to *George A. Wasson* is dismissed, but without prejudice.

*The Court* rendered a decree accordingly, with costs, &c.

*S. Judah*, for the complainant.

*J. Farrington*, for the defendants.

(1) *Green et al. v. Vardiman et al.*, Vol. 2 of these Rep., 324.

(2) *Dean v. Williams*, 17 Mass., 417, accord.

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### SMITH v. BROWN.

**PLEADING—LOST INSTRUMENT.**—In an action at law on an obligation alleged to be lost, the declaration must describe the obligation correctly (a).

**SAME—EVIDENCE.**—A declaration in covenant, on an obligation averred to be lost, described the obligation as being dated on the *first of November*, 1826. *Held*, that the action was not sustained by proof that an obligation

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(a) *Semble*, that the averment of the loss of a written instrument sued upon, need not be supported by affidavit. *Blasingame et al. v. Blasingame*, 24 Ind., 86. See 25 *id.*, 473; 15 *id.*, 511.

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like that described in the declaration except as to the date, was executed by the defendant on the *sixteenth of April*, 1827.

**CONDITION PRECEDENT.**—If the performance of a condition precedent be averred in the declaration, and put in issue by the plea, the averment must be proved as laid.

**APPEAL** from the *Rush* Circuit Court. In this case, *Brown* was the plaintiff below and *Smith* the defendant.

**M'KINNEY, J.**—This action is covenant on an article of agreement averred to be lost or mislaid. The plaintiff avers that the defendant by an article or memorandum of agreement, dated the 1st of *November*, 1826, covenanted to teach and instruct him in the art and science of physic and surgery for the term of three years, and to give him the necessary instructions and furnish proper books, for and in consideration [\*23] of the \*sum of fifty dollars *per annum*, to be paid by the plaintiff; that he paid to the defendant fifty dollars *per annum*; that on the day of the date of the covenant, and after the payment of the fifty dollars *per annum*, he applied to the defendant to be taught and instructed in the art and science of physic and surgery, and to be furnished with proper books, &c.; and he alleges, as a breach, the defendant's refusal to teach and instruct him, and to furnish the proper books.

To the declaration, the defendant filed four several pleas: 1st, he denies that such an instrument in writing under seal, as is described and specified in the plaintiff's declaration, is lost and mislaid; 2d, he denies that the plaintiff paid to him the sum of fifty dollars *per annum* for the term of three years; 3d plea, covenants performed; conclusion in each of the above pleas to the country and issue. 4th plea, that after the plaintiff had remained with him eighteen months, he voluntarily left him and withdrew from his instructions, and put it out of his power to instruct him; that during the time plaintiff remained with him, he instructed him, &c.; and that the plaintiff did not pay him as he specifies, or other than a *pro rata* sum for the time he was with him: to this plea concluding with a verification, there is a general replication, and issue to the country.

Verdict and judgment for the plaintiff.

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A bill of exceptions shows, that the defendant called upon the Court to instruct the jury as follows: 1st, that if it has not been proved to their satisfaction that the plaintiff had, previously to the commencement of this suit, paid to the defendant the sum of \$150, being fifty dollars *per annum* for three years, they must find for the defendant; 2d, that if they are satisfied from the evidence, that the only article of agreement, entered into between the defendant and the plaintiff, was dated on the 16th of *April*, 1827, and not on the 1st of *November*, 1826, as is stated in the declaration, they must find for the defendant; 3d, that if they believe from the evidence that the paper read to them in these words, to wit: "Memorandum of an agreement made and concluded by and between *Matthew Smith*, of the county of *Rush* and State of *Indiana*, of the one part, and *Ryland T. Brown*, of the same place, of the other part, witnesseth, that whereas the said *Ryland* did, on the 1st of *November* last, commence the study of medicine with him, the said *Matthew*, and does now bind himself to [\*24] continue the study with him for the term \*of three years from this commencement with unremitting attention, and does further bind himself to pay the said *Matthew* the sum of fifty dollars *per annum* on his part, for his instructions and the use of his books; and the said *Matthew* on his part does bind himself to furnish the said *Ryland* with all the necessary books and instructions. In testimony whereof, we have hereunto set our hands and seals this 16th day of *April*, 1827,"—is a true copy of the original and only article of agreement between the parties, except as to the signing and sealing, they must find for the defendant. Which instructions the Court refused to give.

When an action is brought upon an instrument alleged to be lost, the plaintiff is not exempted from the necessity of description and averment, which exists when profert is made. The instrument is the foundation of the action, and that form of action appropriate to the instrument must be adopted. If this exemption obtained, much weight would be due to the objections of enlightened courts to the exercise of jurisdiction, by

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courts of law, in the case of lost bonds. The exercise of this jurisdiction was not an usurpation by courts of law, but in entire conformity to their course in analogous cases. In the case of *Read v. Brookman*, 3. T. R., 151, *Grose*, justice, though dissenting from the opinion of the Court, expressed his satisfaction at the decision, which would not have been avowed, if the decision was to be attended by a relaxation of those rules of pleading, so essential to the attainment of justice. The jurisdiction of a court of law is not exclusive: it is concurrent with that of equity. If a party, therefore, be unable to give such a specific description of an instrument as will sustain an action at law, in equity, in which a more general description is permitted, and in which he may have the benefit of the defendant's admission, he can obtain the most ample relief.

Assuming, however, in an action at law to give a specific description, the whole current of authorities, and the principles which pervade the system of pleading, require the party to sustain such description by proof. Not only the existence of the instrument alleged to be lost, but its covenants, at least in substance, should be proved. The plaintiff has averred the instrument lost to have been dated on the 1st of *November*, 1826. His action is founded upon an instrument of that date.

If the instrument in evidence was of a different date, [\*25] the *\*allegata* and *probata* do not correspond. In a declaration on a bill of exchange, there was a variance between the date alleged and the real date of the bill; and the variance was regarded as fatal, and the plaintiff nonsuited. 2 Camp. Rep., 308, n. In *Metcalf v. Standeford*, 1 Bibb, 618, it is laid down that the day of the date of an instrument is material. It is also settled, that if profert had been made, a variance in the date between the instrument declared on and that produced on *oyer*, would have been fatal on demurrer. *Cooke v. Graham's Adm'r*, 3 Cranch, 229. The defendant deprived, by the averment of loss, of *oyer*, denies by pleas the loss of such an instrument as is described in the declaration. The plaintiff submits the question, with others presented in the several pleas, to the jury. We think the plaintiff is thus concluded.



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The classification of covenants, their distinctive character, and the rules for their construction, are so well settled, that it is not thought necessary particularly to advert to them in this case. One of the fixed rules, however, requires the construction to be in accordance with the intention of the parties; and this intention is deducible from their acts. 1 Saund., 320, n. 4; *Worsley v. Wood*, 6 T. R., 710; *McCall v. Welsh*, 3 Bibb, 289. By averring the payment of the fifty dollars *per annum*, the plaintiff has treated the covenants as dependent. We regard the construction thus given correct. No principle is better settled than that averments, necessary to the support of an action, must be proved. So rigid is this rule, and so strict its enforcement, that when issue is taken upon an averment of the performance of a condition precedent, evidence of matter of excuse for non-performance does not support the issue. *Littler v. Holland*, 3 T. R., 590; *Thompson v. Jewell*, 1 Marsh., 195; *Miller v. Alcorn*, 3 Bibb, 267. Indeed, proof of the performance of a condition precedent, when put in the issue by the defendant's plea, can not be dispensed with. *Littler v. Holland*, 3 T. R., 590.

We are therefore of opinion that the plaintiff, having in his declaration given a specific description of the instrument alleged to be lost, is bound by proof to support that description; that if the only article of agreement, entered into between the plaintiff and defendant, was of a date different from that averred in the declaration to be lost, the action could not be sustained; and that the verdict should have been for the defendant. It would seem equally clear that the plaintiff [\*26] having averred the \*performance of a condition precedent, and such performance being put in issue by the defendant's plea should have been proved.

The instructions asked to be given appear to have been proper, and we think should not have been refused.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

O. H. Smith, for the appellant.

J. Rariden and D. Wallace, for the appellee.

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Harter v. Seaman.

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## WAYMAN and Others v. HARDIN.

APPEAL from the *Monroe Circuit Court*.

*G. Hardin* recovered judgment in 1826 against *Wayman* and another, administrators of the estate of *W. Hardin*, for a debt due from the intestate. A bill in chancery was afterwards, viz., in *March*, 1827, filed by *G. Hardin*, against the heirs and representatives of *W. Hardin*. The object of the bill was to obtain a discovery of assets, &c., and to render liable to the judgment at law certain real estate, for which *W. Hardin* in his lifetime held a title-bond, and which bond he had fraudulently assigned to *Wayman*, his father-in-law, for the express purpose of defrauding the complainant.

This fraudulent assignment was made in 1819, pending a suit by *G. Hardin* against the assignor, for a part of the same debt for which the judgment in 1826 was obtained. In 1825, after *W. Hardin's* death, *Wayman* obtained from the obligor of the title-bond, on paying a small balance of the purchase-money left unpaid by *W. Hardin*, a deed for the lands described in the bond; and soon afterwards *Wayman* conveyed a part of the property, without valuable consideration, to his daughter, who was the widow of *W. Hardin*.

*Held*, that the lands described in the deed to *Wayman* from the obligor of the title-bond, were subject to the judgment of *G. Hardin*, and should be sold, &c. *Held*, also, that the administrators of *W. Hardin* should account for assets, to a certain amount, found to be in their hands, &c.

*J. Whitcomb*, for the appellants.

*C. P. Hester*, for the appellee.

[\*27]

\*HARTER v. SEAMAN.

PRACTICE.—The plaintiff produced a receipt in evidence and proved its execution, but did not offer to read it until his closing argument to the jury;

## Harter v. Seaman.

the reading of the receipt was then objected to, because it had not been previously read. *Held*, that the objection was insufficient.

**SAME—DEPOSITION.**—The circumstance that a deposition, which had been three days on file, had not been opened before the jury were sworn, is not of itself a sufficient objection to its being afterwards opened and read in evidence.

**VERDICT—JURY.**—*Seemle*, that a jury may, by leave of the Court, seal up their verdict, separate for the night, and deliver in the verdict next morning; but that if, in the interim, any of the jurors be improperly practiced upon, the verdict will be set aside.

**APPEAL** from the *Tippecanoe* Circuit Court. *Seaman* was the plaintiff below and *Harter* the defendant.

**STEVENS, J.**—This was an action of trespass on the case, in which there were two issues joined to the country, a jury trial, and a verdict and judgment for the plaintiff. It appears of record by a bill of exceptions, that the plaintiff produced as a part of his evidence, a number of receipts which he duly proved, but did not at that time read them; but that, afterwards, his counsel read them to the jury in his closing argument; to which the defendant objected, because they had not been before read, but the objection was overruled. It also appears by the bill, that the plaintiff opened a deposition after the jury was sworn, which had been three days on file; to which opening the defendant objected, but the objection was overruled. It further appears that, as soon as the deposition was opened, the defendant objected to its being read as evidence, for causes which existed prior to the time of swearing the jury; but that objection was also overruled, because it came too late.

The first question is, whether the Court erred in permitting those receipts to be read in the closing argument, they not having been before read. We cannot, from any thing that appears of record, say that there was any error in this. The mere circumstance of the receipts not having been before read, was not sufficient to exclude them, if there was no trick or fraud practiced on the defendant. If the receipts were produced in court as part of the evidence, and were duly proved and laid on the table, either party had a right to read them when they

pleased; they being part of the evidence to go with the jury in their retirement.

[\*28] \*The next question is, whether the Court erred, in permitting the deposition to be opened and read, or not. These were matters for the Court to determine from the facts and circumstances before them. There is nothing in the statute to prohibit the opening of the deposition. There might exist objections to the reading of a deposition at that stage of a cause, which would not be prohibited by the statute; but, in this instance, we are not informed what the objections were to either the opening or reading the deposition, and are therefore bound to presume that the Court decided correctly.

The last question is, did the Court err in directing the jury to seal up their verdict and bring it into court next morning? The record on this point presents no error. It does not appear that the jury were authorized to disperse, or that they did disperse; and if it did so appear, we are not satisfied that that would of itself be error. It is said in the case of *King v. Woolf et al.*, 1 Chitt. R., 401, that it is a matter of discretion with the Court whether the jury shall separate or not; and that a separation does not vitiate the verdict, where there is no suggestion of their having been improperly practiced upon in the interim. This discretion of permitting juries to separate is, however, a great relaxation of the old rigid rule, and ought never to be exercised when it can conveniently be avoided (1).

*Per Curiam.*—The judgment is affirmed with costs.

*W. W. Wick* and *T. H. Blake*, for the appellant.

*W. M. Jenners*, for the appellee.

(1) Vide *Bosley v. Farquar et al.*, Vol. 2 of these Rep., 61, 67, 70, and note *Barlow v. The State*, Idem, 114, and note. See *post*, 136.



## PELTS v. THE STATE.

**INDICTMENT.**—An indictment for receiving stolen goods, knowing them to be stolen, omitted to state that the defendant had received them *with intent to defraud the owner*; but it stated that he had *feloniously* received them, knowing, &c. *Held*, on motion in arrest of judgment, that the indictment was insufficient.

ERROR to the *Greene* Circuit Court.

M'KINNEY, J.—The indictment contained two counts.

[\*29] The \*first charged a larceny. The second charged

“that the said *Joseph Pelts*, on the day and year aforesaid, &c., one copper still cap of the value of three dollars of the personal property of one *John S. Moore* then and there being found, by some evil disposed person to the jurors aforesaid unknown having been then and there feloniously stolen, taken, and carried away, then and there feloniously did take and receive, he, the said *Joseph Pelts*, then and there well knowing the same to have been stolen as aforesaid,” &c. The defendant pleaded not guilty, and on his motion the prosecuting attorney was required by the Court to elect on which count he would rely. He elected to proceed to trial on the second, and entered a *nolle prosequi* on the first. A jury rendered the following verdict: “We the jury find the defendant guilty, and assess his fine at six dollars; that he be imprisoned in the county gaol of *Greene* County for the term of twenty-four hours; and that he be disfranchised, and rendered incapable of holding an office of honour and profit for the term of twelve months.” The defendant moved to arrest the judgment, assigning several reasons in support of his motion. They in substance deny the sufficiency of the count, in the description of the offence. The motion was overruled, and judgment rendered on the verdict.

It is conceded by the counsel for the State, that the indictment is founded on the 4th section of the act of 1829, amendatory of the act relative to crime and punishment. That section contains the following description of the offense: “who

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shall buy, conceal, or receive any stolen goods and chattels, knowing the same to be stolen, with intent to defraud the owner," &c. In *Hawk. P. C.*, 229, sec. 68, in 3 *Bac. Abr.*, 570, and in 1 *Chitt. C. L.*, 232, the rule is said to be general, that in indictments upon statutes, unless the statute be recited, the indictment must bring the offense within all the material words of the statute; that neither intendment nor conclusion is sufficient unless this be done. Appropriate cases in illustration of the rule are given by those writers. *Chitty*, speaking of indictments upon statutes, remarks, "and not even the fullest description of the offense, were it even in the terms of a legal definition, would be sufficient without keeping close to the expressions of the statute." In page 237, he further remarks, that "it is in every case advisable to attend, with the greatest nicety, to the words contained in the [\*30] act, for no others can be so proper to \*describe the crime; the exceptions, if any, are doubtful; and the broad principle which renders a strict adherence essential, is supported by too strong a number of decisions to be shaken."

Adopting this well supported rule, in the examination of the count before us, it would seem clear that the offense described in the statute is not charged in the count. The purchase, concealment, or reception of stolen goods, to subject to the punishment prescribed by the statute, must be, in the language of the statute, "with intent to defraud the owner." The intent constitutes the liability to the punishment prescribed. It is the gist of the offense, and essentially descriptive of it. If the intent were not proved on the trial, guilt under the statute would not attach; and if the intent be necessary to be proved in order to convict, it would seem necessarily to follow, that the count not charging the intent is insufficient. It is, however, contended that the word "feloniously," used in the count, from its legal import, fixes the criminality of the act charged, and well supplies the absence of the words of the statute. In answer to this it may be observed, that this is an offense created by the statute itself highly penal, and that agreeably to the authority referred to,

not even the fullest description in the terms of a legal definition is sufficient, without keeping close to the expressions of the statute. The cases of *Rex v. Pemberton*, 2 Burr., 1035, *Commonwealth v. Boyer*, 1 Binn., 201, and *Commonwealth v. Morse*, 2 Mass. Rep., 128, strongly support the rule laid down by *Hawkins*, *Bacon* and *Chitty*. The latter case is analogous to that before us. It was an indictment upon a statute against forgery and counterfeiting, describing an offense in these words, "or shall have in his possession any such plate or plates engraved in any part, or any paper, &c., devised, adapted and designed as aforesaid (that is, for the purpose of counterfeiting) with intent to use and employ the same in forging," &c. The indictment did not charge that the defendant was possessed of the said paper with "intent," &c. It was adjudged defective, and judgment arrested.

The view we have taken is additionally sustained by the repeal, in 1829, of the 6th section of the act of 1824, relative to crime and punishment. By the latter branch of that section, "every person who shall buy or receive stolen goods, knowing the same to be stolen, shall upon conviction be punished," &c. The count we are examining would [\*31] have been good under that \*section, and the word "feloniously" would have given legal effect to the charge, but is clearly insufficient under the latter enactment, which defines specifically the offense embraced in it (1).

The count is defective, and the defendant's motion in arrest of judgment should have been sustained by the Circuit Court.

*Per Curiam*.—The judgment is reversed. To be certified, &c.

*J. Whitcomb*, for the plaintiff.

*H. Brown*, for the State.

(1) Rev. Code, 1831, p. 181, the same with the act of 1829.

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M'Kinney v. Bellows.

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## M'KINNEY v. BELLOWES.

SET-OFF.—The law of set-off applies only to debts which are liquidated and due in the same right (a).

SAME.—In an action brought by *A.* against *C.* for a debt due to *A.* by *C.*, the defendant cannot set off a debt due to him by *A.* and *B.*; and the circumstance that *A.* and *B.* are non-residents, and have no property within the State, makes no difference.

ERROR to the *Dearborn* Circuit Court.

BLACKFORD, J.—*Bellows* brought an action of debt against *McKinney* on a sealed note, dated in 1830, for the payment of \$500. Plea of payment, with the following matters of set-off: That, in 1818, *Bellows, Stone and Brooks*, as partners under the firm of *Daniel Brooks & Co.*, by their promissory note, promised to pay the defendant thirty-five dollars; that, in 1819, they drew a draft in favour of the defendant for \$6,000 on a certain steam-mill company; which draft the drawees refused to pay, having in their hands no funds of the drawers; and that, in 1820, they gave a written acknowledgment to the defendant for eighty-three dollars and thirty-eight cents. The plea also states that *Bellows, Stone and Brooks* are not resident within the State. To this plea the plaintiff demurred, and the defendant joined in demurrer. The Circuit Court gave judgment for the plaintiff.

The only question in the cause is, were the claims of the defendant the proper subjects of set-off?

The doctrine of set-off was unknown to the common law. By that law, each party had to bring a separate suit against the other for the debt he claimed. According to the [\*32] civil law, \*a set-off was admitted in the name of compensation, provided the debts both of the plaintiff and defendant were liquidated, and were due in the same right. 1 Domat, 513. Compensation, says that law, can only be made between persons who have in their own names the double quality of creditor and debtor. Ib. Courts of

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(a) See 1 Ind., 476; 10 Id., 294; 9 Id., 345.



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chancery, previously to any statute on the subject, admitted a set-off in the case of mutual dealings, where it appeared to have been the intention of the parties that one debt should be set against the other. *Hawkins et al. v. Freeman*, 8 Viner's Abr., 560. But if the debts were unconnected, chancery did not interfere. Per Lord Mansfield, in *Greene et al. v. Farmer et al.*, 4 Burr., 2214.

To remedy the manifest injustice of the common law, and allow debts in certain cases to be set off, the statutes of *Geo. 1.* were passed. The first of these enacts, "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." The second of these statutes enacts, "that mutual debts may be set off, &c., though they are deemed in law to be of a different nature." 1 Tidd's Prac., 580, 581. The words of our own act are, "When two or more dealing together are indebted to each other upon any contract, and one of them commences an action, if the other cannot gainsay or deny the same, he may plead payment of all or part of the debt or demand, and give any contract, account or receipt in evidence, which may be set forth in such plea. R. C., 1831, p. 405. This statute of ours is substantially the same, as to the cases in which debts may be set off, with the statutes of *Geo. 1.* The debts must be, as they were required to be by the civil law, liquidated and due in the same right.

In the cause before us, *Bellows* sues *M'Kinney* on a sealed note given by the latter to the former. Against this note, *M'Kinney* offers to set off debts due to him by *Bellows*, *Stone* and *Brooks*. Here the debt sued for, and the debts offered to be set against it, are not mutual and due in the same right. The plaintiff and defendant have not in their own names the double quality of creditor and debtor. *Bellows* is alone the creditor of *M'Kinney*, but he is not alone his debtor. The attempt is, to set up a joint demand as a set-off against a separate debt; which can not be done. In a case where

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[\*33] the objection to a set-off was, that it \*was for money due from the plaintiff and another, Justice *Buller* says: "The plaintiff's counsel objected to this set-off because there was no mutuality; but that depends on the question, whether the debt is due from the plaintiff and another person, or from the plaintiff alone. If the former, the debt cannot be set off: but it appears that the bond was executed by the plaintiff alone. No debt can arise upon the bond from the other party who did not execute. The plaintiff therefore alone can be sued upon the bond; so that there is a mutuality." *Fletcher v. Dyche*, 2 T. R., 32. This language of the Judge—that if the debt be due from the plaintiff and another it cannot be set off—is in point against the defendant in the case before us. In another cause, the defendants claimed to set off a debt, due them from the firm of *H. & T. Moore*, against a debt due from the defendants to *T. Moore* alone. This was a case of bankruptcy, and the plaintiffs were the assignees of *T. Moore*. At the time of the argument, Justice *Livingston* said, that he had always considered it as one of the clearest principles of law, that a joint debt cannot, at law, be set off against a separate claim. A majority of the Court, however, sustained the set-off on the special provisions of the bankrupt act. But they said that at law, independently of the statute of bankruptcy, the opinion of the Court was, that the discount could not be made. *Tucker et al. v. Oxley*, 5 Cranch, 34 (1).

The plaintiff in error contends that, if the general rule in matters of set-off is against him, still his defense is good, as his plea avers the non-residence of the persons against whom he claims. We cannot conceive how this circumstance of non-residence can affect the case. The question as to the set-off is, are the debts mutual and due in the same right? or, which amounts to the same thing, would *Bellows* be liable to a cross action against himself alone, for the debt proposed to be set off against his demand? On that question, the residence or non-residence of the parties can have no influence. It is true, as was said in the argument, that were *Stone* and *Brooks* dead, the set-off against the surviving partner would be

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supported. *French v. Andrade*, 6 T. R., 582. The reason of this is, the debt previously due by the partnership would exist, at law, against the survivor alone. His liability to a suit at law for the debt, is the same as if he had been the sole contractor. But that is not the case with *Bellows*, [\*34] though his partners do not \*reside within the State.

Were he sued alone for the partnership debt, now attempted to be set off against his action, he might plead in abatement that the supposed promises were made by him and *Stone* and *Brooks* jointly. And it would be no answer to such a plea, that *Stone* and *Brooks* are non-residents, and have no property within the State. *Sheppard v. Baillie*, 6 T. R., 327. *Bellows* has the same right to object to this partnership debt being set off against a suit in his own name, that he would have had to object to its recovery in a suit against himself alone.

The judgment of the Circuit Court, in favour of the plaintiff below, must be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*G. H. Dunn*, for the plaintiff.

*A. Lane*, for the defendant.

(1) *Elder v. Laswell et al.*, Vol. 2 of these Rep., 349.; *Porter v. Nekervia*, 4 Rand., 359.

## HANNA and Others v. EWING and Another

PLEADING.—*A.*, assignee of *B.*, sued *C.* on a promissory note, given by the defendant to *B.* for \$197.79. Plea of payment to *B.* with notice of set-off. The plea shows that, at the date of the note, *B.* owed *C.* more than the amount of the note. Replication, that *B.* was indebted to *A.* in the sum of \$500, and had a quantity of furs worth \$800, a part of which to the value of \$300 dollars, he was about to sell to *A.* in part payment of the debt due him; that *B.* and *C.* then agreed, with *A.*'s consent, that *C.* should buy the whole of the furs and give, in part payment, his note to *B.* of \$300, to be transferred by *B.* to *A.* without its being subject to the demands of *C.* against *B.* and that *C.* would pay the note to *A.*; that the

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Hanna and Others v. Ewing and Another.

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note in question was made and assigned in pursuance of that agreement. *Held*, on general demurrer, that the replication was good.

PRACTICE.—Three pleas in bar; issue in fact on the first plea, the second not noticed; replication to the third plea, demurrer to the replication, and judgment for the plaintiff. *Held*, that the second plea, and the issue on the first, should be disposed of before the plaintiff could have final judgment (a).

ERROR to the *Cass* Circuit Court.

STEVENS, J.—An action of assumpsit was brought by the defendants in error, as assignees of *George Cicott*, [\*35] against the \*plaintiffs in error, in the *Cass* Circuit Court. The declaration contains two counts.

By the 1st count it is averred that the plaintiffs in error, by the firm and name of *Cyrus Taber & Co.*, on the 5th day of *June*, 1830, made their certain due bill, commonly called a promissory note, in writing, by which they promised to pay *George Cicott* \$197.79, for value received; and the said *George Cicott* then and there on the same day, and before any part of the note was paid, transferred it by endorsement to the defendants in error, of which the makers had notice. The 2d count is a general count in indebitatus assumpsit, for \$197.79, for money had and received.

The defendants pleaded four several pleas. The 2d of which pleas is non-assumpsit to the 2d count of the declaration, and the 4th plea is non-assumpsit to the whole declaration. On these pleas there are issues to the country. The 3d plea is a general plea of direct payment to the whole declaration; to which there is no replication or answer in any way appearing of record. The 1st plea is a plea of payment under the 26th section of the practice act; and it is averred, in substance, that there were mutual dealings between the defendants, *Cyrus Taber & Co.*, and the assignor of the note, *George Cicott*; and that, at the time they made the promissory note in question, *Cicott* was indebted to them in the sum of \$913.34½ as follows; by two promissory notes, one for ninety-five dollars and thirty-eight and one-half cents, and the other

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(a) See *Wright v. The State ex rel.*, &c., 8 Blackf., 385.



for seventeen dollars and ninety-six cents, and an open account for \$800, \$500 of which were for goods and merchandise sold and delivered, and \$300 for money lent; and that these sums were all due and owing to them from *Cicott*, at the time they made the promissory note, and are still so due and owing to them; and that therefore they paid the promissory note before they received notice of the assignment.

To this plea the plaintiffs reply, in substance, that the note in question was not so paid by the defendants, because it was not made as a part of the mutual dealings between the defendants and *Cicott*, but was made on a special agreement between *Cicott* and the defendants, with the consent of the plaintiffs, and for the defendants' benefit; and that a good and valuable consideration passed from the plaintiffs to the defendants, as well as from *Cicott* to the defendants, for the promissory note in question as follows: *Cicott* was indebted

[\*36] to the plaintiffs in the sum of \$500, and was possessed of a lot of furs and peltries worth \$800, and was about to pay to the plaintiffs \$300 worth of those furs and peltries, towards the payment of the \$500 dollars he owed them, and the defendants proposed that, if *Cicott* would sell them the whole lot of the furs and peltries, they would in part payment thereof give *Cicott* their promissory note for \$300, which *Cicott* agreed to transfer to the plaintiffs, towards the payment of the \$500 dollars, instead of the furs and peltries; and that they, the defendants and makers of the note, would not set off any of their claims against *Cicott* in payment of the note, but would pay the amount thereof to the plaintiffs. And in pursuance of, and in consideration of that agreement, *Cicott* sold the whole lot of furs and peltries to the defendants, and they gave *Cicott* the note in question as part towards those furs and peltries, to be transferred to the plaintiffs under the agreement so made as aforesaid, and *Cicott* transferred the note to the plaintiffs accordingly.

To this replication the defendants demurred, and the Court overruled the demurrer, and gave final judgment for the plaintiffs for the amount of their demand.

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Jones v. The State.

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The errors assigned are: 1st, the Court erred in overruling the demurrer; 2d, the Court erred in giving final judgment for the plaintiffs' demand over two issues joined to the country, and a plea of payment standing without a replication, all remaining of record undisposed of. The replication in this case, to which the demurrer is filed, is not very well drawn as to form and precision; nor is the language as apt and direct as it should be, but it is substantially good, and the demurrer is correctly overruled. But final judgment should not have been given until the other plea and the issues were legally disposed of. The defendants have a right to be heard on every issue well taken, and if they can sustain any one plea in bar, which is well pleaded to the whole declaration, it is sufficient for them (1).

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

W. W. Wick and J. Rariden, for the plaintiffs.

O. H. Smith and A. S. White, for the defendants.

(1) *Riley et al. v. Harkness*, Vol. 2 of these Rep., 34, and note (2).

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[\*37]

## \*JONES v. THE STATE.

**PETIT JURORS.**—If the board doing county business select, from the list of taxable persons, the names of the petit jurors, according to its discretion, instead of causing their names to be drawn from a box by the clerk, according to the statute, out of the whole number selected, it is a good cause of challenge to the array (*a*).

**ERROR** to the *Bartholomew* Circuit Court.

**STEVENS, J.**—The material facts shown by the record, necessary for us to notice, are these: At the *September* term, 1831, of the Circuit Court of *Bartholomew* County, *John Jones*,

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(a) See *Mitchell v. Likens*, post. 258. No challenge to the array to be permitted because of any informality in empannelling or selecting. 2 R. S., G. & H., p. 31, § 6.

## Jones v. The State.

the plaintiff in error, was indicted for the murder of *John Ray*. He was tried and found guilty, and judgment of death was rendered against him. At the *November* term, 1831, of the Supreme Court, that judgment was reversed, the verdict of the jury set aside, and the case remanded with instructions to award a *venire de novo* and try the issue again. At the *March* term, 1832, another trial was had by a jury, and the prisoner again convicted, and judgment of death passed upon him. To reverse which this writ of error is prosecuted.

Several errors are assigned, but this opinion will be confined to one of them only, the others, as we believe, not being well taken.

The record shows that the panel of the traverse jury who tried the issue, was arrayed under the act of 1831, which makes it the duty of the "boards doing county business in each county to cause to be selected, from the list of taxable persons in the county, the names of eighteen grand jurors and twenty-four petit jurors," "for each and every term of the Circuit Court for one year succeeding such selection," "and in those counties where the term of the Circuit Court extends to two weeks, twenty-four shall be selected as petit jurors for the first week and twenty-four for the second week, each of whose names shall be written on separate pieces of paper and put into a box to be provided and kept for that purpose; and the clerk of the Circuit Court shall, in the presence of the board, draw from said box eighteen names for grand jurors and twenty-four names for petit jurors, for each and every term of said Court." It further enacts that, where the terms of the Court extend to two weeks, double that number [\*38] shall be put into the box and drawn \*as aforesaid, designating for which week each panel is drawn. It further enacts that these names, when so drawn, shall be by the clerk written upon separate panels, distinguishing for which term of the Court each separate panel has been thus selected, and that these panels, so selected and written, shall be by the clerk recorded in the order book of the Circuit Court. And it further enacts that it shall be the duty of the

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clerk, at least thirty days previous to the sitting of each term of the Circuit Court, to make out two writs under the seal of the Court, directed to the sheriff, containing severally the panels of the grand and petit jurors so selected and drawn as aforesaid for that term, commanding him to summon them.

The prisoner, at the proper time, suggested to the Court that the jury, in that instance, had not been selected agreeably to the provisions of the statute, but had been by the board selected at their own discretion, without causing them to be drawn by the clerk, by lottery, out of the whole number; and for that cause challenged the array, and offered to prove the facts, but the Court refused to hear the evidence and overruled the challenge. The defendant had an undoubted right to challenge the array, and if the sheriff had arrayed the panel, any partiality or default of his or his under officers, would have been good cause of challenge. Our statute has taken that duty from the sheriff, and assigned it to the boards doing county business and the clerk of the Circuit Court; and a challenge will lie to the panel, for any partiality or default of those boards, or the clerk, in selecting and arraying the panel; they having been substituted for the sheriff in the performance of that business. *Gardner v. Turner*, 9 Johns. Rep., 260.

Comment or illustration by us, on such a state of facts as this, is unnecessary. It is clear, if the defendant's suggestions are true, that some of the most material requisites of the statute have not been complied with. Whether the facts suggested are true or false, the Court should have inquired. The judgment must be reversed, and the verdict of the jury set aside. *Eaton v. The Commonwealth*, 6 Binney, 447.

*Per Curiam*.—The judgment is reversed and the verdict set aside. Cause remanded, &c.

*P. Sweetser*, for the plaintiff.

*H. Brown, W. Herod, and A. Lane*, for the State.



## Brown v. Benight and Wife.

[\* 39]

## \*BROWN v. BENIGHT and WIFE.

**PARTIES—JOINT CONTRACTS.**—If one of two joint debtors die, the survivor may be sued for the debt; and if the survivor be insolvent, the estate of the deceased is chargeable for the debt in equity (a).

**EXECUTOR DE SON TORT.**—A person set out from this State for *New Orleans* on a trading voyage, leaving his wife and five small children in a destitute situation. His debts exceeded the value of his property, and he did not live to return home. Within a year after his departure, and before his wife had any certain knowledge of his death, she had used the property left by him in the support of the family and in the payment of his debts. Held that, under these circumstances, the widow was not liable, as an *executrix de son tort*, to the creditors of her husband.

**NAME.**—If a father and son are both called *A. B.*, by naming *A. B.* the father *prima facie* shall be intended.

**VENDOR AND PURCHASER.**—*B.* received from *A.*, resident in *New York*, \$100, with a request to buy with the money a tract of land for *A.* in *Indiana*, to take the title in *A.*'s name, and permit the son of *A.* to occupy the land during *A.*'s pleasure. *B.* accordingly bought a tract of land for *A.* in this State, paid on it the money received from *A.*, took an assignment to *A.* of the certificate of purchase, and delivered the same to him. The son occupied the land, and paid the further sum of \$110 of the purchase-money. Held, that this purchase must be considered as made for the father alone; that the legal and beneficial interest was vested in him; and that the land was not liable for the debts of the son.

**BLACKFORD, J.**—This is a suit in chancery transferred from the *Vigo* Circuit Court, the Circuit Judge being interested. The bill states, that *Samuel Bidleman* and *William Battels* were jointly indebted to the complainant, in 1826, for the price of two-thirds of an *Orleans* boat and cargo of corn; that *Bidleman* died in *New Orleans*, within six months or a year after the debt was contracted; that *Battels* is absent from the country and insolvent; and that a balance of the debt, being \$182.25, remains unpaid. The bill further states, that *Samuel Bidleman*, at the time of his death, was possessed of considerable goods and chattels in *Vigo* County; that his widow, then *Sally Bidleman*, took possession of them and sold them; that, besides other property of the deceased received and disposed

(a) See *Devel v. Halsted*, 16 Ind., 287; *Braxton, Adm'r v. The State, ex rel.*, &c., 25 Ind., 82

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Brown v. Benight and Wife.

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of by the widow, there was a certificate for a half-quarter section of land in *Vigo* County, which had cost him \$200; and that this land certificate, with some other property, was sold by the widow to *Benight*, with whom she has since intermarried.

[\*40] \*The object of the bill is to obtain a discovery of the assets of *Bidleman's* estate, and a payment out of them of the complainant's demand. The defendants deny the debt claimed by the bill, except the sum of thirty-three dollars as the price of one-third of the boat; and this sum is alleged to have been paid. They deny that *Samuel Bidleman*, deceased, was ever the owner of the land certificate, or of the land, mentioned in the bill. They aver that the property of *Bidleman*, made use of by the defendant, *Sally*, was appropriated by her, before her knowledge of *Bidleman's* death, to the payment of his debts and the support of his family. They further state that, since the death of *Bidleman*, the defendant, *Benight*, has taken out letters of administration on the estate; that the assets which have come to his hands do not exceed fifty dollars; and that the balance of that sum, after deducting the expenses of administration, he has permitted the defendant, *Sally*, to retain, as part of the \$100 given to her by the statute.

The first inquiry in this case is, whether there is anything due to the complainant from *Bidleman's* estate? The following is the proof: In the spring of 1826, *Bidleman* and *Battels* purchased of *Brown* two-thirds of a boat, which they loaded with corn of their own, except about five hundred bushels received from *Brown* and to be sold for him at *New Orleans*. *Brown* furnished a hired man and part of the provisions for the trip. The boat soon afterwards arrived safe at *Natchez*, where *Bidleman* and *Battels* offered the corn for sale, but without success. They left *Natchez*, two weeks after their arrival, for *New Orleans*; and this is the last we hear of the boat or cargo. Neither *Bidleman* nor *Battels* ever returned. The former is dead, and the latter insolvent. These facts show that *Bidleman* and *Battels* were jointly indebted to *Brown* for two thirds of the boat. Whether or not they were also

indebted to him for the corn he furnished, we shall not stop to inquire. On *Bidleman's* death, *Battels* might have been sued for the joint debt; and, on *Battles'* insolvency, the estate of *Bidleman* became chargeable for it in equity (1).

The next question is, whether the defendants, *Benight* and *Sally*, his wife, executrix of *Bidleman*, are liable to a decree for the debt, or any part of it, for having wasted the assets of the intestate? It is proved that, when *Bidleman* set out with the boat, he left his wife and five small children in a  
[\*41] destitute \*condition; and that his debts were greater than the personal property he left was worth. Within less than a year after his departure, and before any certain knowledge of his death, his wife had made use of this property in the support of his family and the payment of his debts. Among other creditors, she paid the complainant thirty-nine dollars on account of his present demand. We are of opinion that she did not make herself liable to the complainant for any amount, under these circumstances, as executrix in her own wrong. It is further proved, that, in 1823, *Samuel Bidleman*, sen., then and still resident in *New York*, the father of the *Bidleman* mentioned in the bill, delivered \$100 to *Benight* with instructions to buy land in *Indiana* with the money for him, *Samuel Bidleman*, sen.; to take the title in his, the father's, name; and to permit his son *Samuel* to occupy the land during his, the father's, pleasure. *Benight*, accordingly, bought the land mentioned in the bill, for *Samuel Bidleman*, sen.; paid the \$100, money of *Samuel Bidleman*, sen., and received the certificate assigned to *Samuel Bidleman*, by which name both the seller and *Benight* intended *Samuel Bidleman*, sen., resident in *New York*. Besides the \$100 so paid by *Benight*, *Samuel Bidleman*, jun., paid to the vendor of the land \$110 in property. *Benight*, afterwards, delivered the certificate for the land to his principal, *Samuel Bidleman*, sen. From the time of this purchase, in 1823, the land was occupied by *Samuel Bidleman*, jun., until his departure for *New Orleans* in 1826. These are the material facts proved as to this part of the case.

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The assignment of this land certificate must be considered, under the circumstances, as having been made to *Samuel Bidleman*, the father. It is decided that if father and son are both called *A. B.*, by naming *A. B.* the father *prima facie* shall be intended. *Lepiot v. Browne*, 1 Salk., 7. Besides, it is expressly proved that, in the case before us, the father was intended. But notwithstanding the assignment was to the father, if the purchase had been really a joint one by the father and son, a trust would have resulted to the latter according to the money paid by him. *Elliott v. Armstrong*, May term, 1829; *Botsford v. Burr*, 2 Johns. Ch. Rep., 405. It appears to us, however, from the testimony, that this purchase was made on account of the father alone, and that all the parties intended that both the beneficial and legal title should be vested in him.

[\*42] What \*induced the son to advance a part of the consideration-money for his father, or when or how he expected to be repaid, if at all, it is not worth while to indulge in conjecture. It is sufficient for the decision of the cause to know that the money was not paid by the son with any view of obtaining, by such payment, any title to the land either at law or in equity; and that, in fact, no such title has ever been made to him. It is the opinion of the Court, therefore, that *Samuel Bidleman*, jun., had no interest in the land mentioned in the bill, and that it can not be made liable to the claims of his creditors.

The account of the administration of *Benight* himself, as rendered in the answer to the bill, is not contradicted. It shows that there are no assets in his hands.

*Per Curiam*.—The bill is dismissed with costs.

*J. Farrington*, for the complainant.

*A. Kinney*, for the defendants.

(1) By the common law, upon the death of one joint-contractor, the action survives against the other or the rest, and the representative of the deceased is not liable at law. The *English* commissioners lately appointed, etc., had some doubt whether it would not be desirable to provide that, in the case of such death, the creditor should have the option of bringing the action either against the survivor or survivors only, or against the survivor or survivors



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jointly with the personal representatives of the deceased. They concluded, however, not to interfere with the existing rule. 6 Lond. L. M., 261.

In *Indiana*, the representatives of a deceased *joint* obligor are liable to an action at law, by the statute, in the same manner as if the obligation were joint and several. Rev. Code, 1831, p. 291.

## THE STATE v. ARMSTRONG.

**FEES.**—*Scire facias* against a surety on a forfeited recognizance for the principal's appearance to an indictment. Previously to judgment on the *scire facias*, the principal was surrendered in discharge of his bail, and judgment was rendered against the surety, conformably to the statute, for the costs. *Held*, that the prosecuting attorney's fee, in such case, is two dollars and fifty cents.

## ERROR to the Dearborn Circuit Court.

BLACKFORD J.—*Armstrong* entered into a recognizance for the appearance of a person indicted for an assault and battery. The defendant in the indictment made default, the recognizance was declared forfeited, and a *scire facias* was [\*43] issued \*requiring *Armstrong* to show cause why execution should not issue against him. Previously to judgment on the *scire facias*, the person indicted was surrendered in discharge of his bail; and judgment was rendered, conformably to the statute, against *Armstrong* for the costs (1). The execution and fee bill, which issued against *Armstrong*, contained a charge of five dollars as a fee to the prosecuting attorney. The Circuit Court, on motion, struck that charge out of the fee bill.

The statute regulating the fees of different officers, gives to the prosecuting attorney a fee of five dollars for every conviction on an indictment or presentment, and a fee of three dollars on every unsuccessful application for a divorce. This statute gives, also, a fee of two dollars and fifty cents as an attorney's fee in all civil actions at law, when the title to land does not come in question, and of five dollars when it does (2). The recognizance under consideration is an obligation of

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record, with a pecuniary penalty. The proceeding by *scire facias* against the recognizor, after the forfeiture of the recognizance, is to recover the penalty, and is entirely of a civil nature. The defendant in the *scire facias*, therefore, in becoming fixed for the costs, is liable to pay as an attorney's fee, not five dollars due on a conviction by presentment or indictment, but two dollars and fifty cents, given to the successful party in every civil case.

The Circuit Court were right in striking out the fee of five dollars, but they committed an error in not allowing the two dollars and fifty cents.

*Per Curiam*.—The judgment is reversed. Cause remanded, with instructions, &c.

*H. Brown*, for the State.

*A. Lane*, for the defendant.

(1) Rev. Code, 1831, p. 316, 409.

(2) Rev. Code, 1831, p. 246.

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### FARLEY v. SMITH.

**PRACTICE**.—*Assumpsit* before a justice of the peace. Declaration on a promise to deliver the plaintiff a hogshead of tobacco, with the money counts; but nothing said in the declaration as to any instrument of writing.

Judgment for the plaintiff. The defendant appealed, and the justice [\*44] sent up the declaration, and also a \*note purporting to be given by the defendant to the plaintiff for a hogshead of tobacco. Judgment on appeal for the appellee. *Held*, that this Court could not, under these circumstances, presume that the note was the cause of action, or that it was offered in evidence in the Court below. *Held*, also, that the judgment of the Circuit Court is presumed to be correct, unless the record show the contrary.

**ERROR** to the *Marion* Circuit Court. *Smith* sued *Farley* before a justice of the peace and obtained a judgment. *Farley* appealed to the Circuit Court, and a judgment was there also rendered against him.

## Farley v. Smith.

STEVENS, J.—This was an appeal tried in the *Marion* Circuit Court, upon a transcript of the judgment and proceedings of a justice of the peace. The action is assumpsit, and the declaration contains four counts, all founded upon promises averred to be made on the 29th of *April*, 1825. The 1st count is for a hogsheaf of tobacco payable on the 1st of *March*, 1826, to be first rate, and to weigh 1,100 pounds, averred to be worth thirty-three dollars; the 2d count is for forty dollars money lent and advanced; the 3d count is for goods, wares and merchandize, worth forty dollars; and the 4th count is for forty dollars' worth of work and labor. There is no instrument in writing declared on or mentioned in any way in the declaration. The defendant pleaded two pleas, one non-assumpsit, and the other non-assumpsit, supported by an affidavit of its truth. It appears of record by a bill of exceptions that, on the trial in the Circuit Court, the plaintiff introduced evidence to prove the hand-writing of the subscribing witnesses, and the identity of the defendant's person; and the defendant introduced evidence to prove that he did not, on the 29th of *April*, 1825, execute a note to the plaintiff, but that if he ever did give the plaintiff a note for tobacco, it was given in *April*, 1823, payable the 1st of *March* following.

The Court decided, that it was immaterial to the plaintiff's right to recover in the cause, whether the note was executed in *April*, 1823, and payable in the month of *March* next following, or was executed in *April*, 1825, and payable in the month of *March*, then next following, or whether the note was dated in 1823 or 1825.

No part of the record shows, nor does the bill of exceptions show, that any note was offered in evidence on the trial of the case, either before the justice of the peace or the Circuit

Court, or that the judgment of the Court is founded [\*45] on any note or \*other particular evidence; nor does the record or bill of exceptions set out the evidence which sustained the case, and on which the Court founded the judgment. It is stated in the record, that the justice of the

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peace sent up to the Circuit Court with the transcript, an original appeal bond, the cause of action in these words, setting out the declaration, the defendant's bill of defense, and a note of hand in these words and figures, to-wit: "On the 1st of *March* next, I will deliver to *Tho. Smith*, at *Johnston's* warehouse, one hogsheaf of tobacco, first rate, which shall weigh 1,100 pounds nett. Value rec'd. 29th *April*, 1825. *William* ✕ *Farley*." And the caption of the transcript of the proceedings of the justice of the peace is in these words: "State of *Indiana*, *Marion* county. *Thomas Smith* v. *William Farley*, defendant. Plaintiff's demand on note for delivery of 1,100 pounds tobacco, thirty-three dollars debt and forty dollars damages, total seventy-three dollars." But in the body of the transcript no notice is taken of the note; nor is there anything definite or certain about the note mentioned in the caption. We are not informed what its date was, to whom payable, or by whom made, or when payable. And the note, which the record informs us was sent up to the Circuit Court, and is set out at full length on the record, appears by express words not to be the cause of action.

The Court appears to have been substituted by the parties, to hear the evidence and try the issues, instead of a jury; and the plaintiff under the issues had a right to give parol evidence, under any of the counts in the declaration; he also had a right to give in evidence the note spread upon the record, or any other promissory note not under seal, which was due and payable from the defendant to the plaintiff at the time his suit was brought; and from the whole evidence the Court was, in this case, the proper tribunal to determine whether the plaintiff had sustained his action or not. It does not, however, appear that any note was given in evidence.

This Court is bound to presume, that the Court below decided correctly unless the contrary appears, and that could only be made appear, in this case, by spreading all the evidence given, on the record. This not having been done, the judgment of the Circuit Court must be affirmed.



## Hawkins and Others v. Johnson.

*Per Curiam*.—The judgment is affirmed with costs.

*C. Fletcher*, for the plaintiff.

*H. Gregg*, for the defendant.

[\*46]

\*HAWKINS and others v. JOHNSON.

**PLEADING.**—Declaration in debt by an execution-plaintiff on a delivery-bond payable to the sheriff, conditioned for the delivery of the property on a certain day. Suggestion on the record, that the bond is defective in not being made payable to the plaintiff. Breach, that the property was not delivered on the day specified in the condition, nor at any other time since the execution of the bond. *Held*, on general demurrer, that the declaration was good.

**SAME.**—A declaration in detinue may be objectionable on general demurrer, if it do not aver the value of the property; but the averment of value, in trespass or trover, or in suits on contracts for the delivery of property, is only matter of form.

**APPEAL** from the *Martin* Circuit Court.

**BLACKFORD, J.**—This was an action of debt by *Johnson* against *Hawkins, Smith* and *Davis*. The declaration states that an execution in favour of *Johnson* against *Hawkins*, was levied by *Love*, the sheriff, upon a horse, saddle and bridle, the property of *Hawkins*; that *Hawkins, Smith* and *Davis* executed a bond payable to *Love*, sheriff, in the penalty of \$400, conditioned that *Hawkins* should deliver the property to *Love*, sheriff, to be sold by him at the house of *John P. Davis*, on the 20th of *May* then next following, by the hour of 11 o'clock; and that the bond is defective, in being made payable to the sheriff instead of to the execution-plaintiff, the latter being the party interested. The breach assigned is—that *Hawkins* did not, on the said 20th of *May*, at 11 o'clock, nor at any other time since the making of the said writing obligatory, deliver the horse, saddle and bridle, nor either of them, to *Love*, sheriff, &c. The defendants demurred generally to the declaration, and the Court gave judgment for the plaintiff.

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The appellants, defendants below, rely for a reversal of the judgment on the following grounds:—

First, that the bond is payable to the sheriff, and the suit is in the name of the execution-plaintiff. This objection is answered by the 25th sec. of the practice act, R. C., 1824, p. 294, which was in force when the bond, in the present case, was executed. That section authorizes a suit to be brought by the party interested, on a bond like the one before us, though it have not the substantial matter required by law—the party suggesting, as in this case, that the bond is defective.

[\*47] \*The second objection is, that the assignment of the breach is insufficient. The general rule is, to assign the breach in the words of the contract, or in words co-extensive with the import and effect of the contract. 1 Chitt. Pl., 326. That rule is complied with in this case. The averment is, that the property was not delivered at the time and place fixed by the bond. This is sufficient. There is a case, where the promise was to deliver goods *on* or *before* the 19th of *January*, and the breach was, that they were not delivered *on* the 19th of *January*. Even that breach was held good. The objection, to be sure, was not made till after verdict; but *Holt*, C. J., said, that the breach would have been good without a verdict. *Harman v. Owden*, 1 Lord Raym., 620. Had the promise in that case been, as in the present one, merely to deliver on a specified day, the decision shows that no one would have doubted the goodness of the breach on demurrer. The defendant here says, the property may have been delivered before the day. The answer is, the sheriff was not bound to receive it until the day, and it is not to be presumed that he did so. If he did, it was for the defendant to show that fact by plea. The declaration, besides saying there was no delivery on the specified day, says “nor at any time since the making of the bond,” &c. These latter words are mere surplusage, and can not be reached by the demurrer.

The last objection is, that there is no averment of the value of the property agreed to be delivered. This omission, in an action like the present, is no objection on general demurrer.

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It might be a substantial defect in detinue, where the action is for the goods themselves or their value. But in trespass, or trover, or in suits on contracts for the delivery of property the averment of the value is only matter of form. *The Mayor, &c., of Reading v. Clark*, 4 Barn. & Ald., 268.

*Per Curiam*.—The judgment is affirmed, with five *per cent.* damages and costs.

*S. Judah*, for the appellants.

*A. Kinney*, for the appellee.

[\*48]

## HOOVER v. HANNA.

**JURISDICTION.**—The Circuit Court cannot take cognizance of a matter of controversy or suit, unless the same be brought before it by process of law or other legal proceedings (a).

**ERROR** to the *Wayne* Circuit Court. This suit was commenced by the appearance of *Hoover* and *Hanna*, in the Circuit Court, and their filing an agreement entered into by them, relative to certain facts connected with their respective claims to the office of clerk of the Circuit Court in *Wayne* County. The agreement concludes with praying the Court to determine which of the parties was entitled to the office. The Circuit Court, thereupon, gave judgment in favour of *Hanna*.

**STEVENS, J.**—The opinion of the Circuit Court in this case must be reversed; the Circuit Court having no jurisdiction, as a judicial court, of any matter of controversy or suit, unless it be brought before the Court by regular process of law, or other regular legal proceedings known to the law. *Dewhurst v. Coulthard*, 3 Dall., 409. This case was not so brought before the Court.

*Per Curiam*.—The judgment is reversed. To be certified, &c.

*O. H. Smith* and *M. M. Ray*, for the plaintiff.

*J. Rariden*, for the defendant.

(a) Courts will not take cognizance of fictitious suits. *Brewington & Low*, 1 Ind., 21; 4 Id., 260; 29 Id., 546.

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Hiday and Others v. Gilmore.

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## HIDAY and Others v. GILMORE.

**MITTIMUS.**—A person being imprisoned by virtue of a mittimus issued by a justice of the peace, which did not show the cause of commitment, brought an action of trespass against the justice, the constable who executed the mittimus, and the persons who assisted the constable. *Held*, that the mittimus was no justification for the defendants.

**TRESPASS—COSTS.**—In an action of trespass in the Circuit Court, in which the damages claimed exceed twenty dollars, the defendant, if found guilty, is subject to costs, though the damages assessed be less than twenty dollars.

[\*49.] \*SAME.—Trespass for an assault, &c., against four persons. Two were found guilty, and two were acquitted. *Held*, that the defendants acquitted were entitled to costs. *Held*, also, that under the statute law, a defendant is entitled to costs in all cases in which he obtains a verdict.

**ERROR to the Madison Circuit Court.** The plaintiff below claimed in this action \$500 in damages.

**BLACKFORD, J.**—*Gilmore* brought an action of trespass for an assault and battery and false imprisonment, against *Hiday*, *Chodrick*, *Cotterill* and *Doty*.

The defendants jointly pleaded two pleas in justification. The first plea is, in substance, that the plaintiff having been fined by *Hiday*, a justice of the peace, for an assault and battery, and having refused to pay or replevy the fine, the justice issued a mittimus, by virtue of which *Chodrick* as constable, and *Cotterill* and *Doty* by his command, took the plaintiff, &c. The second plea is the same with the first, except that the fine is alleged to have been for profane swearing.

The plaintiff replied to both pleas, that the defendants had committed the trespass of their own wrong, &c.

On the trial, the defendants offered in evidence a mittimus, stating that the plaintiff had been brought before the justice on a charge of profane swearing, and breaking the peace by an assault and battery on the body of *Richard Kinman*; that for want of security sufficient to defray the fine and costs, and for failing to enter into a recognizance, &c., the gaoler was



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commanded, &c. The plaintiff objected to this mittimus as evidence, and the Court sustained the objection.

On motion of the plaintiff, the Court instructed the jury that they must, under the state of the pleadings, find *Hiday* and *Chodrick* guilty. The jury found a verdict of guilty against *Hiday* and *Chodrick*, and assessed the damages at five dollars; and a verdict of not guilty as to *Cotterill* and *Doty*. A motion for costs in favour of all the defendants, was made and overruled; as was also a motion for costs in favour of *Cotterill* and *Doty*. A judgment was entered on the verdict against *Hiday* and *Chodrick* for the damages assessed and for costs.

We think the Court did right in refusing to admit the mittimus in evidence. It was too defective to authorize the imprisonment charged. It is essential to the validity of a mittimus that it set out the cause of commitment. 3 Bl. Com.,

127. That is not done in this case. The pleas state [\*50] that, the plaintiff \*being fined for profane swearing and for an assault and battery, and not paying or replevying the fines, the mittimus was issued against him. But the mittimus offered in evidence, does not show that any fine had been assessed against the plaintiff, and was consequently inadmissible under either of the pleas.

After the rejecting of the mittimus, the pleas in justification under it were left without any support; and, of course, the subsequent charge of the Court, that the justice and constable must be found guilty, was unobjectionable. The plaintiff would have been entitled, had he asked it, to a similar charge as to the other defendants.

We consider the Court right, also, in refusing to give costs to *Hiday* and *Chodrick*, who were found guilty, though the damages assessed were less than twenty dollars. It is only where the damages *claimed*, in trespass, do not exceed twenty dollars, that the plaintiff suing in the Circuit Court, instead of before a justice, is subjected to costs. Rev. Code, 1824, p. 251 (1).

The two defendants, *Cotterill* and *Doty*, were acquitted by

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the jury, and were entitled to a judgment for their costs. It is true, that costs in such cases were not allowed in *England* until the statute of 8 and 9 *Will.* 3, which is not in force here. But, by a fair construction of our own statute law, a defendant must be considered entitled to costs in all cases in which he obtains a verdict (2).

The judgment against *Hiday* and *Chodrick* is affirmed; but the judgment refusing costs to *Cotterill* and *Doty* must be reversed.

*Per Curiam*.—The judgment on the verdict against *Hiday* and *Chodrick* is affirmed. The judgment refusing costs to *Cotterill* and *Doty*, on the verdict in their favour, is reversed. Cause remanded, &c.

*C. Fletcher*, for the plaintiffs.

*H. Brown* and *W. Quarles*, for the defendant.

(1) *Vide* Rev. Code, 1831, p. 297.

(2) *White v. Loyd et al.*, May term, 1834, *post*.

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 [\*51]      \*HARBISON v. LEMON and Others.

**CONDITIONAL SALE.**—*A.* conveyed a tract of land to *B.* in consideration of a certain sum of money, and *B.* on the same day obligated himself by a bond to re-convey the land to the grantor on the repayment of the purchase-money within a certain time. *Held*, that these two instruments of writing, taken together, amounted to a mortgage (*a*).

**INCAPACITY TO CONTRACT—ESTOPPEL.**—The doctrine that an obligor or grantor shall not be permitted to stultify himself, in order to avoid his bond or conveyance, is not recognized in modern times. But that doctrine, were it recognized, would not prevent the heirs of an obligor or grantor from showing his incapacity to contract.

**SAME.**—A conveyance may be avoided by a grantor either at law or in equity, if, at the time of its execution, he was so destitute of understanding as not to know what he was doing, whether the incapacity were occasioned by idiocy, lunacy, or drunkenness (*b*).

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(a) *Heath v. Williams*, 30 Ind., 495; 22 Id., 427; 6 Blackf., 113; 4 Id., 101.

(b) *Gates v. Meredith*, 7 Ind., 440; *Yeates et ux. v. Reed et ux.*, 4 Blackf., 463; *Jenners v. Howard*, 6 Id., 240.

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OPINION OF WITNESS.—But the mere circumstance that, in the opinion of a witness, the grantor was too much intoxicated, when he executed the deed, to transact business safely, is not sufficient of itself to avoid the deed.

ERROR to the *Dubois* Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed by *Harbison* against *John Lemon* and others, heirs of *Jacob Lemon*. The bill states that *Jacob Lemon* conveyed to *Harbison*, the complainant, a certain tract of land for a valuable consideration; and that, on the same day, *Harbison* bound himself by a bond to re-convey the land to the grantor, on being repaid the consideration-money within a certain time. It also alleges that *Jacob Lemon* is dead, and that the defendants are his heirs. The prayer of the bill is, that the equity of redemption be foreclosed, and the land sold for the payment of the debt. The answer of the defendants admits the execution of the deed and bond mentioned in the bill. It denies, however, that any consideration was paid for the deed; and avers it to have been fraudulently obtained by the complainant from the grantor, whilst the latter was in a state of intoxication. The only evidence in the cause is one deposition, introduced by the defendants. This deposition states, that the consideration for the deed, as the witness understood from the parties, was as stated in the bill. It alleges further, that the grantor, when he executed the deed, was too much intoxicated to transact business safely. The decree of the Circuit Court is in favour of the defendants.

[\*52] \*The deed and defeasance in this case, taken together, amount to a mortgage. The circumstance of the defeasance being a separate instrument from the deed, does not change the nature of the transaction. *Dey v. Dunham*, 2 Johns. Ch. Rep., 182. The defendants wish to avoid this mortgage of their ancestor, by showing him to have been drunk when he executed the deed. There are two questions made in this case. The first is, whether a deed can be avoided, in any case, on the ground of drunkenness in the grantor? If it may, then, secondly, whether the grantor's intoxication, as proved in this case, was sufficiently great to destroy the deed?

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The doctrine in *England* for a long time was, that a man should not be permitted to stultify himself. Co. Litt., 247. It was not, however, originally the law of that country, as is shown in Fitzherbert's *Natura Brevium*, p. 202. Nor is it believed to be the law, either there or here, at the present time. But were that principle still to be recognized, it would not affect the cause before us. It is not the mortgagor himself, but his heirs, that are the defendants in this case; and it was never denied but that the heirs might avoid the bond of their ancestor, on the ground of his incapacity to contract. Co. Litt., 247; *Beverley's case*, 4 Co. Rep., 123. The incapacity produced by drunkenness, has been often distinguished from that arising from idiocy, lunacy, and the like. It is said by Lord *Coke*, that a drunkard is *voluntarius dæman*; and that his drunkenness being of his own procuring, affords him no privilege. Co. Litt., 247. This harsh doctrine, however, has been very considerably relaxed since the time of *Coke*. In later and more liberal times it has been held, that the obligor may avoid his bond at law, by proof that they made him sign it when he was so drunk that he did not know what he did. Bull. N. P., 172. And it has been also said, that a man may be relieved in equity, against his deed, on the ground of drunkenness, if he had been made drunk through the contrivance of the grantee. *Johnson v. Medlicott*, 3 Peere Wms., 130. The true principle probably is, that a deed may be avoided, either at law or in equity, if, at the time of its execution, the obligor was so destitute of understanding as not to know what he was doing; whether the incapacity be occasioned by idiocy, lunacy, or drunkenness (1).

The 2d question is, was the grantor, in the case before [\*53] us, so \*drunk as to be insensible to what he did? A single witness only is called to sustain the defense. His evidence is, that he came up to the parties about the time when the deed was executed; and that the grantor was much intoxicated, and too drunk, in the opinion of the witness, to transact business safely. The contract is not shown to be unfair; nor is there any proof that the intoxication was



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produced by the grantee's contrivance. The defendants rely on the naked fact of drunkenness. To enable them to succeed, they were bound to prove the drunkenness to have been so great as to produce an absolute privation of understanding for the time, similar to cases of idiocy or insanity. This they have not done. The circumstance of the grantor's being too much intoxicated, in the opinion of a witness, to transact business safely, is not sufficient of itself to avoid the deed. It might have been important in making out a case of fraud, but that was not attempted.

*Per Curiam.*—The decree is reversed with costs. Cause remanded, &c.

*C. Fletcher*, for the plaintiff.

*C. I. Battell*, for the defendants.

(1) The following is Mr. *Starkie's* language on this subject: "A defendant may avoid even a deed, on *non est factum* pleaded, by evidence that he was made to sign it when he was so drunk that he did not know what he did; in which case it is entirely void. So, *a fortiori*, may he avoid an alleged agreement not under seal, by such evidence. Bull. N. P., 172; *Pitt v. Smith*, 3 Camp., 33; *Fenton v. Holloway*, 1 Starkie's Cas., 126. It has indeed been said, that a court of equity will not relieve in such a case, unless the inability were occasioned by the management and contrivance of him who gained the deed. *Johnson v. Medlicott*, 3 Peere Wms., 130; 1 Ves. & Beam., 30. But, at common law, no such distinction seems to obtain: the law regards the contracts of one who for the time is bereaved of reason, though by his own folly, as void, and does not punish his moral delinquency by subjecting him to obligations, to which assent is essential, when he was incapable of assent. See the observations of *Bayley, J.*, in *Bagster v. Earl of Portsmouth*, 7 Dowl. & Ryl., 614." 2 Stark. Ev., 5th Amer. ed., 287.

A late *English* case decides the general rule in these cases to be, that a court of equity will not assist a person who has obtained, or wishes to get rid of, an agreement or deed, on the mere ground of intoxication; that exceptions to the rule are, where any contrivance was used to draw him into drink, or any unfair advantage made of his situation; or where he was in that extreme state of intoxication, which deprived him of his reason, and which even at law would invalidate a deed. *Cooke v. Clayworth*, 18 Ves., 12.

An *English* writer, in 1829, thus expresses himself: "Neither law nor common sense allows that, where one of the essential ingredients is [\*54] wanting, the binding consequences of a contract should attach; and mental incapacity, at the time of contracting, is admitted therefore as a good defence, not only in equity but at law. Our law was, indeed, once

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disgraced by the recognition of a contrary doctrine, supported by a refinement of absurdity, which declared that a man could not be allowed to stultify himself. Co. Litt., 247; 4 Co., 124; Cro. Eliz., 398. But at this day no stipulation, however testified, whether by parol, by deed, or by record, entered into by one, who at the time was destitute of understanding, will prevail in a court of equity; and even at common law, nothing but the transcendent authority of a record, which admits of no question, is exempt from impeachment on that ground. Hob., 224. Whether the temporary prostration of the understanding, induced by a fit of drunkenness, is such an incapacity for contracting, as will on that account defeat an engagement entered into under such circumstances, was a question formerly much controverted: Ch. Cas., 107; Co. Litt., 247; but it seems now to be settled, as good sense and consistency demand, that such an engagement, wanting the requisite assent of the understanding, is invalid both at law and equity. 18 Ves., 15, 16; Bull. N. P., 172; 3 Camp., 33; 1 Stark. Cas., 126." Lond. L. M., 533.

A marriage was annulled in an ecclesiastical Court, in a suit by the husband, on the ground of his insanity at the time of the marriage. Lord *Stowell*, in the decision of that case, says: "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own *past* incapacity; and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract." *Turner v. Meyers*, 1 Hagg. C. R., 414.

The opinion in the text is sustained by the following *American* authorities: *Mitchell v. Kingman*, 5 Pick., 431; *Samuel v. Marshall*, 3 Leigh, 567; *Barrett v. Buxton*, 2 Aiken's Rep., 167; *Prentice v. Achorn*, 2 Paige, 30; 2 Kent's Com., 451. The Chancellor, in *Prentice v. Achorn*, *supra*, says: "Voluntary drunkenness will not protect a person from liability for torts, or from punishment for crimes, committed while in that situation; but it renders him for the time incapable of exercising reason, without which he cannot make a valid contract."

With respect to lunacy, it has been decided that a tradesman, having *bona fide* furnished necessities to a lunatic without being aware of his infirmity, may recover their value in an action at law. *Littledale, J.*, in this case, observed that a deed, bond, or other specialty, might be avoided by a plea of lunacy, if at the time it was executed, the contracting party was *non compos mentis*, but that this rule did not apply to the case before the Court. *Bagster v. Earl Portsmouth*, 7 Dowl. & Ry., 614.

See Chitt., Jun., on Cont. 29, 256; Shelford on Lunatics, 410-414, 419-422; Hurlstone on Eonds, 4; Ind. Rev. Code, 1831, p. 287.

## THE STATE v. COGGSWELL.

**EXTORTION—INDICTMENT.**—In an indictment for extortion where nothing was due, there must be an averment that nothing was due; and if the charge be for taking more than was due, the indictment must show how much was due.

[\*55] \*ERROR to the *Hamilton* Circuit Court.

BLACKFORD, J.—This is an indictment against a justice of the peace for extortion. The indictment charges that the defendant, being a justice, &c., did, unlawfully and by color of his office, take and extort from one *Robert Still* the sum of three dollars; which sum of three dollars was not then and there due to the said justice; and which sum was three dollars more than was then and there due to the said justice; contrary to the form of the statute, &c. There is a second count to the same effect with the first. The Circuit Court, on motion of the defendant, quashed the indictment.

This indictment is clearly defective. There is express authority for saying that, in an indictment for extortion where nothing is due, it must be averred that nothing was due; and that if the charge be for taking more than was due, the indictment must show how much was due. Neither of these allegations is contained in this indictment; and it cannot, therefore, be supported. *Lake's Case*, 3 Leonard's Rep., 268; 4 Comyn's Digest, 154.

*Per Curiam.*—The judgment is affirmed. To be certified, &c.

*H. Brown*, for the State.

*C. Fletcher*, for the defendant.

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WILBURN v. LARKIN and Others.

**BOND—CONSTRUCTION OF.**—A bond commenced as follows: Know all men, &c., that we, *Lionel J. Larkin, Dennis Carroll*, &c., are held, &c., and the

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 Wilburn v. Larkin and Others.
 

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form of its execution as concerned *Larkin* was as follows: For *L. J. Larkin*, *George Crum*, [L. S.] Held, that so far as relates to the face of the bond, *Larkin* must be considered as one of the parties to it; but that its execution would have been more formal had it been thus: *Lionel J. Larkin*, [L. S.] by *George Crum*, his attorney.

## ERROR to the Posey Circuit Court.

BLACKFORD, J.—This was an action of debt by *Wilburn* against *Larkin* and others, on an appeal bond. The declaration states “that *Jesse Y. Wilburn* complains of *Lionel J. Larkin* (alias *L. J. Larkin*), *George Crum*, *James P. Drake* (alias *J. P. Drake*), *John Knight*, *Dennis Carroll*, and *Andrew* [\*56] *Burlison* \*(alias *A. H. Burlison*), in custody, &c., of plea, &c. For that whereas the said defendants heretofore, to-wit, on, &c., at, &c., by their certain writing obligatory, sealed with their seals, &c., acknowledged themselves to be held, &c. To be paid, &c., when they, the said defendants, should be thereunto afterwards requested.” The condition of the bond and the breach are then set out. To this declaration the defendants, without craving oyer, pleaded *non est factum*.

On the trial, the plaintiff offered in evidence a bond to the following effect: “Know all men, &c., that we, *Lionel J. Larkin*, *Dennis Carroll*, *John Knight*, *James P. Drake*, *Andrew Burlison* and *George Crum*, are held, &c. For the payment, &c., we bind ourselves, our heirs, &c., jointly and severally,” &c. This bond is conditioned for the due prosecution of the appeal by *Larkin*. The form of the execution of the bond by *Larkin* is as follows: For *L. J. Larkin*, *George Crum* [L. S.] The other obligors appear to have executed the bond in person. The defendants objected to this bond as evidence, on the ground that it varied from the one described in the declaration, in this, that the bond, as stated in the declaration, purported to be *Larkin’s*, whilst that offered in evidence was the bond of *Crum* and not of *Larkin*. This objection was adjudged valid by the Circuit Court, and the bond was rejected.

The verdict and judgment were for the defendants. The plaintiff appeals to this Court.

The only question in the cause is, whether the bond offered



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in evidence purports on its face to be the bond of *Larkin*? The defendants contend that it appears to be *Crum's* bond and not *Larkin's*. We have no doubt on this question. *Larkin* is named in the body of the bond as one of the obligors, and it appears to be executed for him by an agent. So far, therefore, as the face of the bond determines the point, *Larkin* must be considered one of the parties to it. The case of *Deming v Lindley*, May term, 1823, shows this. The execution would have been more formal, had it been thus: *Lionel J. Larkin*, [L. S.] by *George Crum*, his attorney. But it is in substance the same. The objection, therefore, made to the admission of the bond in evidence was insufficient, and should not have been sustained. This decision will not prevent the defendants from making any other objections in the Circuit Court, to the admission of the bond, which they may consider valid (1).

[\*57] \**Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*S. Judah*, for the plaintiff.

*S. Hull* and *C. I. Battell*, for the defendants.

(1) Although the bond be executed for the principal by an agent, it may, as in the case in the text, be declared on as made by the principal himself. Chitt. on Bills, 7th ed., 357. It is usual, however, to state that the party executed the bond by an agent. Ib; 2 Chitt. Pl., 117.

## HAGAR and Another v. MOUNTS.

**PROMISSORY NOTE—PLEADING.**—If a special plea, denying the execution of a note on which the suit is founded, be not verified by affidavit as the statute requires, and the plaintiff make no objection to the plea on that ground, but go to trial on the merits, he is presumed to have waived the formality of the affidavit (a).

**FRAUD.**—If *A.*, for a debt due to him from *B.*, take a note executed by *B.* in the name of the firm of *B. & C.*, without the knowledge of *C.*, it is a fraud

(a) *Bradley et al. v. The Bank of the State &c.*, 20 Ind., 528; 4 Blackf., 168; Id., 445, post, 231.

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on *C.* and the note does not bind him: and if *D.*, supposing from its face that the note has been duly executed by *B. & C.*, execute it with the intention of being their surety, it is also fraudulent and void as to him (b).

APPEAL from the *Bartholomew* Circuit Court.

BLACKFORD, J.—*T. Mounts* sued *D. Hagar* and *G. B. Hart* before a justice of the peace, on a promissory note for \$100. The note filed is as follows: "*Columbus, January 14, 1831. Three months after date, we or either of us promise to pay unto Thomas Mounts or order, one hundred dollars, for value received; (Signed) Wilson & Hagar. Gideon B. Hart.*" *Hagar* pleaded, that the note was given by *Wilson* for money long before obtained by the latter and one *Arnold*, and not for the use of *Wilson & Hagar*; that he, *Hagar*, had never assented to the making of the note; and that these facts were known to the plaintiff. *Hart* pleaded the same facts that are contained in *Hagar's* plea, and stated further that when he signed the note he did so, as he supposed, as a surety for money due from *Wilson & Hagar*. The cause was tried by the justice, and judgment rendered, on the merits, in favor of the defendants.

*Mounts* appealed to the Circuit Court. The parties, by agreement, submitted the cause to the Circuit Court [\*58] without the intervention of a jury. The Court, after hearing the allegations and proofs, gave judgment in favour of the plaintiff for \$102.50, besides costs. On the trial of the cause before the Circuit Court, a bill of exceptions to the following effect was filed: The defendants, *Hagar & Hart*, offered to prove that the note sued on, was for a debt due by *Wilson & Arnold* before *Wilson & Hagar* were partners; that it was given by *Wilson* to secure that debt without *Hagar's* knowledge or consent; and that *Hart* supposed he was becoming surety for a debt due by the firm of *Wilson & Hagar*. This testimony the Court refused to admit. The appellants, *Hagar* and *Hart*, contend that the evidence, set out in the bill of exceptions, should have been received.

The first thing to be examined is, whether the evidence

(b) See this case, post, 261; 5 Blackf., 367.

## Hagar and Another v. Mounts.

offered, supposing it tended to the making of a good defense, was admissible under the pleas filed? By the statute, any plea requiring proof of the execution of a bond or note, must be supported by affidavit. Rev. Code, 1824, p. 292. The pleas in this case deny the execution of the note by *Hagar* and aver it to have been given by *Wilson* for his individual debt. If the statute extends to these pleas, it was for the plaintiff to object to them on that ground. This he did not do; but, on the contrary, he went to trial, without objection, on the merits of the defense. He must, therefore, be presumed to have waived the formality of an affidavit to the pleas. Where the parties go to trial on the general issue without its being sworn to, the defendant is presumed to rely on some other defense than a denial of the note. But no such presumption can exist, in the case of a special plea denying the execution of the note. The plaintiff need not go to trial on the special plea unless it be sworn to, but if he does, the same proof will be admissible as if the affidavit had been made. Considering the pleas in this case, therefore, as regularly before the Court, the evidence in their support, if it tended to show a valid defense, should not have been rejected.

We come now to the second question in the cause. Did the testimony offered tend to prove that the plaintiff ought not to recover? There is no difficulty on this point. It is settled by decided cases. *Mounts*, the plaintiff below, for a private debt due to him from *Wilson*, takes a note from *Wilson* in the name of the firm of *Wilson & Hagar*, without the knowledge of *Hagar*.

[\*59] \*This is a fraud on *Hagar*, and the note does not bind him. The note appearing on its face to be the note of *Wilson & Hagar*, is executed by *Hart* with the intention of being their surety. If it was fraudulent and void as to *Hagar*, it must be so also as to *Hart*. *Hart* might be willing to be surety for the firm of *Wilson & Hagar*, but not for *Wilson* alone. The evidence offered, therefore, constituted a good bar to the action, and ought to have been admitted by the Circuit Court. *Shirreff v. Wilks*, 1 East., 48; *Arden v.*

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*Sharpe*, 2 Esp. R., 524; *Green v. Deakin*, 2 Stark. R., 347; *Livingston v. Hastie*, 2 Caines' R., 246; *Livingston v. Roosevelt*, 4 Johns. R., 251.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*P. Sweetser* and *J. Whitcomb*, for the appellants.

*H. Gregg*, for the appellee.

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### COOPER, Administrator, v. THATCHER and Another.

**ADMINISTRATOR—COSTS.**—A bill in chancery, filed by an administrator on a cause of action which accrued to the intestate in his life-time, was dismissed upon the merits. *Held*, that the defendant was not entitled to a decree for costs (a).

#### ERROR to the Allen Probate Court.

STEVENS. J.—*Cooper*, the plaintiff in error, is the administrator of the estate of *James Thatcher*, deceased, who died intestate. As such administrator, he filed a bill in the Probate Court of the county of *Allen* against one *John Thatcher* and *Otho White*, the defendants in error, on a cause of action which accrued to the intestate in his life-time. After various proceedings, the bill was finally dismissed and a decree rendered against the complainant, the administrator, for costs.

Several errors are assigned for the reversal of the decree, but it is not necessary to notice them. The bill could not have been sustained, even if the facts charged in it were true; hence the only question for us to determine is, whether the court erred in rendering a decree against the administrator for costs? At common law neither party recovered costs.

[\*60] The *English* \*statutes, giving costs to defendants, are held to apply only to the cases where the contract was made with, or the wrong done to, the plaintiff himself. An

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(a) Executors and administrators not liable in their individual capacity for costs of suit. 2 R. S., G. & H., p. 527, § 151. See 6 Ind., 44, post 239; 4 Blackf., 77; 20 Ind., 406.



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executor or administrator-plaintiff, therefore, being a stranger to the affairs of the deceased, is considered not liable for costs when he acts *bona fide*, and could not have sued in his own right. 3 Bl. Comm., 400; Sayer on Costs, 94; *Harrison v. Warner*, 1 Blackf. Rep., 385 and note (2), and the authorities there cited (1). The administrator in this case could not have sued in his own right, and as nothing appears of record that shows he did not act *bona fide*, the decree as to the costs must be reversed.

*Per Curiam*.—The decree as to the costs is reversed, &c. Cause remanded, &c.

H. Cooper, for the plaintiff.

J. Raviden, for the defendants.

(1) In *England*, executors and administrators were not, until a very recent statute, *personally* liable for costs when they sued *at law* on contracts alleged to have been made with the deceased, though they were nonsuited or had a verdict against them; but the estate was liable in such cases. *Baker v. Tyrwhitt*, 4 Campb., 27. If the declaration alleged the contract to have been made with the plaintiff, though in his representative character, and he failed as mentioned above, he was then *personally* responsible for the costs. *Jobson v. Forster*, 1 Barn. & Adol., 6; *Slater v. Lawson*, Id., 893. *In equity*, an executor, whether plaintiff or defendant, who incurred costs in performance of his duty, was allowed them out of the estate. 2 Williams on Ex'rs., 1252-3.

The *English* statute now enacts—"That in every action brought by an executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." Stat. 3 and 4 Will., 4. See 2 Chitt. Gen. Pr. Supp., 105.

Since this statute it has been decided, that on a declaration, containing an account stated with the plaintiffs as executors, though it also contains counts on promises to the testator, the defendant is entitled to costs as of course, in case of a nonsuit; and that the executors cannot be relieved, in such a case, under the statute of 3 and 4 Will., 4, which extends only to cases in which executors were before exempted from the payment of costs. *Spence v. Albert*, 4 Nev. & Man., 385; 13 Lond. L. M., 451.

END OF MAY TERM, 1832.



## \*CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1832, IN THE SEVENTEENTH YEAR OF THE STATE.

SACKET *v.* JOHNSON and Another.

**APPRENTICESHIP.**—Covenant by *A.* against *B.* and *C.* upon an indenture of apprenticeship. The indenture commences as follows: "This indenture made, &c., between *B.* and *C.*, his father, of the one part, and *A.* of the other part, witnesseth, that the said *B.* hath by his own free will, and with the consent of the said *C.*, his father, testified by his signature to these presents, put himself apprentice," &c. The following is the conclusion: "In testimony whereof, the parties have hereunto set their hands and seals the date above mentioned.—*B.* [L. S.] *C.* [L. S.] *A.* [L. S.]" There are no covenants inserted on the part of *C.* Breach assigned, that the apprentice had absented himself, &c. *Held*, that the father's execution of the indenture was a mere expression of his assent to it as required by statute; and that, as he had entered into no covenants, this action could not be sustained (*a*).

**ERROR to the *Clark* Circuit Court.**

**M'KINNEY, J.**—This is an action of covenant brought on an indenture of apprenticeship.

(*a*) See on the subject of apprentices 1 R. S., G & H., p. 431.

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Sacket v. Johnson and Another.

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The plaintiff declares that on the 24th day of *April*, 1829 at, &c., by a certain indenture of apprenticeship, then and there made and sealed with the seals of said *Bartholomew Johnson* and *Solomon Johnson*, the said *Bartholomew* [\*62] *Johnson*, by his own free \*will and by the consent of his father, the said *Solomon*, testified by his signature to said indenture, put himself an apprentice unto the said plaintiff to the trade and occupation of a house-joiner, to dwell with him as an apprentice from the date aforesaid, until the 24th day of *April*, 1833; during which term, the said *Bartholomew* and the said *Solomon*, by said indenture, covenanted with the plaintiff, that the said *Bartholomew* should faithfully serve the said plaintiff, and not depart or absent himself without the leave of the said plaintiff, during said term, &c. The plaintiff avers that the said *Bartholomew*, as an apprentice, was received into his service, &c., and that he on, &c., did unlawfully absent himself, &c.; that the said defendants have not kept their said covenant, &c.

On *oyer* prayed, the following indenture was set out:

“This indenture made this 24th day of *April*, in the year of our Lord, 1829, between *Bartholomew Johnson* and *Solomon Johnson*, his father, of the county of *Clark* and State of *Indiana*, of the one part, and *Nathan Sacket* of the county and State aforesaid, of the other, witnesseth, that the said *Bartholomew Johnson* hath by his own free will and accord, and with the consent of the said *Solomon*, his father, testified by his signature to these presents, put himself apprentice unto the said *Nathan Sacket*, to learn the trade and occupation of a house-joiner, which the said *Sacket* useth, and with him to dwell as an apprentice from the date of these presents until the 24th day of *April*, 1833; during all which term the said apprentice, his said master well and faithfully shall serve, keep his lawful commands, do and obey, &c. From the service of his said master he shall not at any time depart or absent himself, without the consent of his said master, &c.; and the said *Sacket* on his part and in consideration of the premises, promises well and faithfully to teach and instruct



or cause to be taught and instructed, the said *Bartholomew Johnson* in," &c. The indenture concludes: "In testimony whereof, the parties have hereunto set their hands and seals this date above-mentioned. *Bartholomew Johnson*, [L. S.] *Solomon Johnson*, [L. S.] *Nathan Sacket*, [L. S.]"

The defendants then demurred generally. The Circuit Court sustained the demurrer, and rendered judgment in favour of the defendants for costs.

The indenture is obviously drawn within the provisions of the statute respecting apprentices (1). By that act, the [\*63] consent \*of the father or guardian of any person within the age of twenty-one years, must be signified by the signing and sealing of the indenture, to give it validity. If the father or guardian, in addition to his consent signified by signing and sealing, should enter into covenants, he is, as other covenantors, responsible for their execution. *Mead v. Billings*, 10 Johns. Rep., 99; *Branch v. Ewington*, Dougl. Rep., 518.

The plaintiff in error contends, that the covenants in the indenture are jointly made by the defendants, and that both are responsible, if any of the covenants have been broken. He founds this position on the language used by the parties, in the beginning and conclusion of the indenture. The indenture is made by *Bartholomew Johnson* and *Solomon Johnson* of the one part, and *Nathan Sacket* of the other, and witnesseth that the said *Bartholomew Johnson* of his own free will and accord, and with the consent of the said *Solomon*, his father, testified by these presents, puts himself, &c. Here the reason is given why the father is a party—to give his consent, which is required, that the son should put himself an apprentice, and clearly not to incur liability for covenants into which the apprentice, in the body of the indenture, afterwards enters. The apprentice and the master respectively covenant, and it is only when we reach the conclusion of the instrument that the father again appears. He then, as one of the parties, signs and seals the indenture. The cases of *Blunt v. Melcher*, 2 Mass. Rep., 228, and *Ackley v. Hoskins*, 14 Johns. R., 374,

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are in point. These decisions are given upon instruments like the one before us, and upon statutes with similar provisions to that of this State.

We are therefore of opinion that the Circuit Court decided correctly, in sustaining the demurrer to the declaration.

*Per Curiam*.—The judgment is affirmed with costs.

*C. Dewey*, for the plaintiff.

*J. H. Thompson* and *I. Naylor*, for the defendants.

[1] Rev. Code, 1831, p., 70.

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[\*64]

\*GIVEN v. BLANN.

LANDLORD AND TENANT.—Sheaves and shocks of corn are exempt from distress for rent.

PRACTICE.—When a demurrer to an avowry for rent is overruled, the jury impanelled under the statute in such case, must find the value of the distress as well as the arrears of rent, or the defendant cannot have judgment for the rent due (a).

ERROR to the *Switzerland* Circuit Court.

STEVENS, J.—The plaintiff declared against the defendant in an action of replevin, for unjustly and unlawfully, on the 15th day of *July*, 1831, taking and detaining the goods and chattels of the plaintiff, to wit, one hundred shocks of wheat, reaped, bound into sheaves, and standing in shocks on the field of the plaintiff. The defendant avowed the taking in manner and form, &c., because the plaintiff held and enjoyed said field of him, the defendant, as his tenant, and had so held and enjoyed, &c., for the term of nine months before the time of making the distress, by virtue of a certain demise, &c., under a certain usual and customary rent of one-third part of the grain raised on the field, at the time of harvesting the same, and the rent so payable became and was due on the 12th

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(a) See *Fimcoke v. Frederick et al.*, 1 Ind., 54.

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day of *July*, 1831, &c. To this avowry the plaintiff demurred; the demurrer was overruled, and judgment rendered for the defendant, that he should have a return of the wheat, &c. A writ of inquiry was then awarded to inquire how much rent was due to the defendant, and the sum of twelve dollars and fifty cents was found due, upon which final judgment was rendered against the plaintiff, that the defendant should recover of him the sum of twelve dollars and fifty cents, together with double costs, &c.

The errors complained of are: 1st, The court erred in overruling the demurrer to the avowry; 2d, The court erred in rendering a judgment of *retorno habendo*, and in rendering final judgment for the rent, without inquiring of the value of the property distrained; and 3d, The Court erred in giving double costs.

[\*65] \*The first point is, did the Court err in overruling the demurrer to the avowry.

The power of distraining for rent is, to say the least of it, tyrannical, and may be made an engine of oppression, and is almost irreconcilable with the spirit of our laws and institutions. It is an extraordinary remedy, and is limited to the strict letter of the law, confined strictly to the authority given, and nothing can be taken by implication. It is a proceeding by which a landlord is permitted to seize and dispose of the property of his tenant, without his consent, and without the assent of his judges or peers, and, as Sir *Edward Coke* expresses it, a proceeding in which he is a judge in his own cause, contrary to the solid maxim of common law; and therefore an avowry must be as certain, direct and special, in both form and substance, as a plea of justification in an action of trespass.

The first objection raised is, that the property taken as a distress is not distrainable. The common law imposes several benign restrictions on this summary authority of distress. It forbids the distraining of many articles, such as, first, things fixed to the freehold or which savor of realty, as fixtures, growing crops, &c.; 2d, things of a perishable nature, as

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milk, &c.; 3d, things that cannot be removed without sustaining some injury, and which cannot be returned in the same plight in which they were when taken, as sheaves and shocks of corn; 4th, things delivered to a person exercising a trade, to be worked up or used in the way of his trade; 5th, beasts of the plough and implements of husbandry; and 6th, instruments of a man's trade. 3 Bl. Comm., 9, 10; 3 Kent's Comm., 382; *Simpson v. Hartopp*, Willes, 512. The two last-mentioned exemptions are only exempt *sub modo*, that is, upon the supposition that there is a sufficiency of other property to be distrained. The property distrained in this case, is sheaves and shocks of corn in the field, which are exempt from distress by the common law, and, if our statute does not authorize such a distress, the proceedings are illegal and void.

It has not been contended that the statute expressly authorizes such a distress, but that it has taken away the reason of the common law, and therefore the law is virtually, as to that, repealed; that, at common law, the distress was taken as a pledge, and was held until the tenant paid the rent or replevied the property; and therefore sheaves and shocks of [\*66] corn could \*not be taken, because the removal and return would injure them; but, by our statute, the distress is to be absolutely sold, unless the rent is paid or the property replevied; and therefore the reason of the common law cannot apply. To this argument it may be correctly answered, that the reason of the common law remains unimpaired; the right of the tenant to pay the rent or to replevy the distress, remains in full force; no alteration as to that is made, only the time is limited to a few days; but if he does pay the rent or replevy the property within the time limited, it must be returned to him without damage, and in the same plight it was in when seized; and, in the case of sheaves and shocks of corn, that is impossible, and therefore they certainly remain as things forbidden to be taken as a distress. It may be further answered that nothing can be taken by implication, and that, unless the statute expressly authorizes the distress, it is illegal.



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It has been further argued, that the 8th section of our statute virtually authorizes the distraining of sheaves and shocks of corn. That section authorizes the distraining of growing crops, but says nothing about sheaves and shocks. It is thought that this 8th section of the statute has nothing whatever to do with the point under consideration. The reason of those common law exemptions must be kept in view. Growing crops are exempt from distress, not because they cannot be returned without injury, and in the same plight in which they may be taken, but because they savour of realty, and the object of that section is to extend the right of distress to those things which savour of realty, and it cannot by any correct view of the case, be extended by implication to goods and chattels. Sheaves and shocks of corn are goods and chattels, and if that 8th section extends to them, it extends to milk and all other exempted goods and chattels. That section of our statute is precisely like the *English* statute on the same subject, and it has never been supposed in *England* to extend, by implication, to any thing other than the things named, that is, growing crops. In *England*, they have a statute expressly making sheaves and shocks of corn liable to be distrained for rent, but it is a statute made for that express purpose, and the articles and things thereby subjected to distress are expressly named, and it has never been carried, by implication, to any thing not expressly named. We have no such statute.

[\*67] \*It is also further contended, that the 2d, 5th and

7th sections of our statute virtually make sheaves and shocks of corn distrainable. The 5th section gives the landlord a lien on "all the goods and chattels" of the tenant, to the amount of one year's rent, when his claims for rent are brought in collision with the claims of other creditors, but it is a proviso with which the tenant has nothing to do, he is not affected in any way by it, it only affects creditors. It does not extend the remedy by distress, nor is the remedy by distress the subject-matter of that section. A landlord has all the remedies by suit or suits that other creditors have, in addition

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to his extraordinary remedy by distress, and he may pursue any of them he pleases; but if he resorts to the remedy by distress, he must take its disadvantages as well as its advantages. This 5th section operates as a mortgage on all the goods and chattels of the tenant, to the amount of one year's rent, against other creditors; but against the tenant it has no effect—as to him it is a dead letter. The subject-matter of the 2d and 7th sections is the remedy by distress **for** rent, and relates to and points out various proceedings in the prosecution of that remedy. Words used in statutes are restrained, limited, or extended by the subject of their application, and hence the propriety of the rule that “words are to be construed in reference to the subject-matter.” The statute forbidding ecclesiastical persons to purchase provisions at *Rome*, did not prohibit the buying of grain or meat, that not being the subject-matter. The statute forbidding the drawing of blood in the streets, did not extend to a surgeon who opened a vein in the streets, that not being the subject-matter. The statute giving the ship and cargo to those who might remain on board, when the ship was deserted in a storm by the owners and mariners, did not extend to a sick man, who lay in the ship and was unable to get out, and the ship drifted safely into port by chance, with the sick man on board, because he did not come within the meaning and subject-matter of the act. And the words “*all cattle*,” when speaking of commons and commonable cattle, are limited and restricted to commonable cattle, that being the subject-matter. From this rule of construction, and it is the only rule known to the law, it irresistibly follows that the words “*any goods and chattels*,” as used in the 7th section of the act, are restricted and limited to goods and chattels that

[\*68] \*are distrainable, distress and things subject to distress being the subject-matter.

If this view of the case, and the law governing it, is correct, no doubt can exist as to the illegality of the distress. The property seized was not distrainable, and the demurrer to the avowry ought to have been sustained (1).

The second error is also well assigned, but it is unnecessary

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to say anything about that, as the first defeats and renders null the whole defense set up (2).

*Per Curiam*.—The judgment is reversed with costs.

*O. H. Smith*, for the plaintiff.

*S. Merrill*, for the defendant.

(1) The rent in this case, viz., one-third of the grain raised, was not sufficiently certain to authorize the remedy by distress. *Clark v. Fraley*, November Term, 1833, post.

(2) *Larkin v. Wilburn*, Vol. 2 of these Rep., 343, and note, accord.

## HAMILTON v. WORT.

**ARBITRATION AND AWARD**.—An award is not, under the statute, conclusive as to the law or the facts of the case (a).

**SAME**.—A party has a right to prove in the Circuit Court, as an objection to an award, any misconduct of the arbitrators or of the opposite party; or to show, by introducing the evidence which was before the arbitrators, that they have mistaken the merits of the cause.

**ERROR to the Jackson Circuit Court.**

**BLACKFORD, J.**—*Samuel Wort* and *Thomas Hamilton*, the parties in this case, entered into bonds dated the 17th of November, 1829, submitting a certain matter in difference between them to arbitration; and the arbitrators made an award in favour of *Wort*.

The arbitration bond executed by *Hamilton*, and the award of the arbitrators, were returned to the Circuit Court; and a rule was obtained by *Wort*, at the September term, 1830, calling upon *Hamilton* to show cause why the award should not be made the judgment of the Court. *Hamilton* appeared, and in answer to the rule pleaded, in substance, that the arbitrators in making their award had mistaken both the law and the facts of the case, which he was ready to verify. This plea was demurred to by *Wort*. The Circuit

(a) See *The Indiana Central Railway Co. v. Bradley et al.*, 7 Ind., 49.

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Court sustained the demurrer, and made the award the judgment of the Court.

*Hamilton* contends that he had a right to impeach the award, by proving that the arbitrators had not correctly determined the merits of the controversy.

The decision of this case depends upon the construction to be given to our statute relative to arbitrations. This act differs materially from that of *William* the 3d on the same subject. The *English* statute, after making the party who refuses to perform an award, liable to process for a contempt of court, says—"which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such court that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means." It also provides, that the court making the rule for submission, may set aside the award if it has been "procured by corruption or undue means," provided the corruption or undue practice be complained of before the last day of the next term after the award is made. 2 Tidd's Practice, p. 733, 751. To set aside an award under this act, it has been often decided that the party must show some illegality appearing on the face of the award, or some irregularity, as want of notice of the meeting, or collusion, or gross misbehavior of the arbitrators. But the Court will never, on motion, enter at large into the merits of the cause. 2 Tidd's Prac., p. 750.

Our statute on the subject of setting aside awards was, originally, the same in substance with the *English* law. The first act relative to arbitrations in this country was passed in 1799, at the first session of the general assembly of the *North Western Territory*. This act, after subjecting the party in default to process for contempt, reads as follows: "which process shall not be stayed or impeded by order of any other court of law or equity, or by the court from whence it issued, until the parties shall in all things obey the award or umpirage, unless it shall be made to appear on oath, that the umpire or arbitrators mis-



behaved, and that such award or umpirage was obtained by fraud, corruption, or other undue means; and no testimony shall be \*received to impeach or invalidate the said award or umpirage, after the second day of the term next after the term in which the submission was made a rule of court." Acts of the *North Western Territory* in 1799, page 46. This statute was re-enacted without any alteration in 1807, by the legislature of the *Indiana Territory*; Rev. Code of 1807, page 175; and it continued to be the law here until the legislature, in 1811, thought proper to change it. From 1799, therefore, until 1811, the law of this country as to impeaching awards was substantially the same with the *English* statute of *William* the 3d; and they could not be set aside during that period, unless they had been obtained by corruption or other undue means. The award, showing no illegality on its face, was conclusive as to the merits of the cause. But the act of 1811 made a very material alteration in the law on arbitrations. The statute of that year enacts, that after the award is returned, there shall be a rule against the losing party to show cause why the award should not be made the judgment of the court. And it also enacts "that the party showing cause why the award or umpirage should not be made the judgment of the court, *shall be at liberty to produce before the court any evidence he can, to show that the said award or umpirage was obtained by mistake, either in matter of law or fact; or that the same was obtained by corrupt or other undue means; and in either case the said award or umpirage shall be annulled and set aside, at the costs of the party prosecuting the same.*" Besides these new provisions in the statute of 1811, there is inserted in it one entire new section, which makes it the duty of the Court, when an award or umpirage is returned, "to hear any evidence either party may offer, whether to invalidate or support the same, and to set aside or enter judgment on the award or umpirage, as to said Court may seem just." Acts of 1811, p. 90.

These new enactments of the legislature placed the law of arbitration on a very different footing from what it was before.

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They added an entire new ground of objection to the validity of awards, unknown to the previous law of this country or of *England*. They expressly permit the party objecting to an award to introduce evidence to prove that the arbitrators have not determined the merits of the cause correctly, but have made a mistake in the law or the facts of the case. These new

statutory provisions were re-enacted verbatim in the  
[\*71] revision of \*the statutes in 1818, in 1824, and in 1831.

They must govern our decision in the present cause.

It is impossible for a party objecting to an award, unexceptionable on its face, to have the benefit of those clauses of our statute to which we have referred, unless he be permitted to exhibit to the Court the testimony that was adduced before the arbitrators. There is no other way by which the Court can be enabled to determine whether the arbitrators have mistaken any of the questions of fact, or of law, belonging to the cause. By our statute as it now stands, and has stood since 1811, the merits of an award on a rule to make it a judgment, like the merits of a verdict on a motion for a new trial, must be inquired into by the Court. In the case of a verdict, the Court having heard the evidence, require no further examination of it. But in the case of an award it is otherwise. The Court have had no opportunity to know what was the evidence before the arbitrators. It appears to us, therefore, that the party objecting to an award for mistakes in matter of fact or law, not shown by the award itself, must be permitted to produce before the Court the testimony upon which the award is founded. The award, made by judges of the parties' own choosing, is entitled to great respect; but it is not, under our statute, conclusive as to the law or the facts. It may be considered as standing on ground similar to that on which a verdict stands. If the party complaining of an award can prove any misconduct on the part of the arbitrators, or of the opposite party; or if he can show, by introducing the evidence that was before the arbitrators, that they have mistaken the merits of the cause, the Court may refuse to permit the award to become a judgment.

In the case before us, *Hamilton* was ruled to show cause why

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The State on the relation of Conley v. Flinn and Others.

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the award against him should not be made a judgment of the Court. He showed cause against the rule, by pleading that the arbitrators had mistaken the law and facts of the case, which he offered to prove. The Court considered such mistakes, assuming them to exist, to constitute no legal objection to the award; and therefore refused to hear the evidence. This decision of the Circuit Court is in opposition to the express provisions of the statute, and cannot be supported.

The rule to show cause, in this case, like a rule to show cause why a new trial should not be granted, or a judgment arrested, required no special pleading. We have not, therefore, [\*72] \* considered it necessary to examine the objections to the form of the defendant's statement in answer to the rule against him. It is enough for us to know, that the defendant offered to prove, in opposition to the rule, that the arbitrators had mistaken the merits of the controversy; and that the Circuit Court refused to hear the evidence. The judgment is erroneous, and must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Sullivan and I. Hawk*, for the plaintiff.

*A. C. Griffith*, for the defendant.

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THE STATE, on the relation of CONLEY v. FLINN and Others.

JUSTICE OF THE PEACE. —If a justice of the peace, in the discharge of any of his ministerial or judicial duties, act corruptly to the injury of a party, his conduct is a breach of the condition of his official bond.

ERROR to the *Lawrence* Circuit Court.

M'KINNEY, J.—This is an action of debt brought against a justice of the peace, and his sureties, on his official bond.

The plaintiff declares that *Robert Flinn* was elected a justice of the peace of *Lawrence* County, and, with the other defendants,

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executed, on the 19th day of *August*, 1828, a bond with the condition—that he should faithfully discharge the duties of his said office, and pay over on demand to the proper person authorized or entitled to receive the same, all moneys that should come into his hands by virtue of his office—averts that the said *Robert Flinn* has not kept and observed the conditions of the said bond, but hath broken the same in this, that he has not faithfully discharged his duty as such justice of the peace, but that he hath acted illegally, oppressively and corruptly, in his said office in this, that one *John Phillips* heretofore, to wit: on the 26th day of *April*, 1830, deposited with him a note drawn by *Joel Conley* and *John Dean*, in favour of said *Phillips*, for twenty-five dollars, payable on or before the 1st of *June*, 1830, for collection as a justice of the peace, and that the said

*Robert*, disregarding his obligation to wait until the 1st [\*73] of *June*, 1830, \*and until an action had accrued on said note, did unjustly, unfaithfully, illegally and corruptly issue a summons against the said *John Conley*, on the 26th day of *April*, 1830, summoning him to answer said *Phillips* in a plea of debt on the note aforesaid, he well knowing said debt was not due, that said proceeding was contrary to law, and well knowing that said *Conley* was then absent from home on business that would render his return uncertain; further avers that said *Robert*, as such justice of the peace, after issuing such summons as aforesaid, did knowingly receive from the officer who pretended to serve and execute the same, a false and illegal return, and that the said *Robert*, on the day and year aforesaid upon which he issued the summons, after knowingly receiving a false and illegal return on the same, did unfaithfully, illegally and corruptly give judgment against the said *Conley* in favour of said *Phillips*, for said sum of twenty-five dollars, together with interest from the 26th day of *April*, 1830, till paid, he, the said *Robert*, well knowing no such debt was due, and that it was contrary to law to give judgment on the same day the summons was issued, that there was no service, either actual or constructive, and especially knowing that no interest was due from the 26th of *April*, 1830, until paid. The plaintiff



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further avers that the said *Robert*, as such justice of the peace, after giving the said judgment, did, on the same day, illegally issue an execution upon the said judgment, which was put into the hands of an officer by the said *Robert*, by virtue of which unjust, illegal and fraudulent execution, a horse, belonging to said *Conley*, of the value of \$100, was levied upon by the said officer in the absence of said *Conley*, and sold at public sale, at a great sacrifice, for twenty-five dollars, less than half his value—by means whereof, &c.

The defendants demurred to this declaration; the demurrer was sustained, and judgment rendered in favor of the defendants. To reverse this judgment the writ of error is sued out.

A justice of the peace was required, Rev. Code, 1824, p. 272, to give bond in the sum of \$1,000 with good freehold security, for the faithful discharge of his duty, and for paying over, on demand, to the proper person authorized or entitled to receive the same, all moneys that might come into his hands. A bond executed agreeably to the statute is sued upon.

Before we advert to the statute, it may be well to inquire how far a justice would be liable for acts done by virtue [\*74] of his office? His duties are judicial as well as ministerial. For a judicial act within his jurisdiction, though he should act illegally or erroneously, he is not liable for damages, unless he has acted from impure or corrupt motives. *Gregory v. Brown*, 4 Bibb, 28. Where, however, he acts corruptly, liability attaches.

In this case, the charges in the declaration are admitted to be true. They present a series of oppressive, illegal and corrupt acts. Some of them are judicial, and others ministerial. A direct exercise of the judicial and ministerial power, with which the justice was clothed, is presented, by which, regardless of his duty, before a cause of action had accrued, he issues a summons, receives a false return of service, renders judgment, allows interest before the debt was due, and, on the day of issuing the summons, issues an execution, and permits the property of an absent person to be sacrificed for less than half its value. This conduct, we think, must be unparalleled in the history of the

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State, and would, if tolerated by law, bring the judicial department into merited odium and contempt. For such acts, the justice, exclusively of the bond, would be subject to damages at the suit of the party aggrieved. These acts could only have been committed by him as a justice of the peace. In that character, and in no other, is he responsible.

Whether his sureties are responsible, must depend on the terms of the bond. They stipulate that he shall faithfully discharge his duty, and pay over all money, &c. What are the duties he is faithfully to perform? Unquestionably, all that attach to the office. It is, however, contended, that the faithful discharge of duty is confined to the paying over money collected, &c. If this had been the intention of the legislature, it would have confined the condition to that particular part of his duty. The paying over the money is only introduced as an instance, and can not be considered as a limitation of the duty to be performed, for the violation of which the sureties interpose their responsibility.

The faithful discharge of duty embraces not only the integrity of the justice, but attaches to the various duties of his office. Is palpable and gross corruption a faithful discharge of duty? It is a violation and abandonment of duty, a disregard of the trust reposed, its prostitution to the gratification of the worst passions, and the application of a power pure in itself, to the production of the greatest possible evil. To confine the [\*75] \*condition of the bond to the mere payment of the money collected, would be virtually to defeat its requirement. This construction is supported by the case of *Minor et al. v. The Mechanics' Bank of Alexandria*, 1 Peters' Rep., 69. It was an action of debt against *Minor* and his sureties upon an official bond. By the condition of the bond, he and his sureties are bound that he shall well and truly execute the duties of cashier. It was assumed in defense, that the sureties were only bound for the honesty of *Minor*. The Court however said, "We are of a different opinion. Well and truly to execute the duties of the office, includes not only honesty, but reasonable skill and diligence. If the duties are performed

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negligently and unskillfully, if they are violated from want of capacity or want of care, they can never be said to be well and truly executed." It was further said, "the security for the faithful discharge of his duties would be utterly illusory, if we were to narrow down its import to a guarantee against personal fraud only."

It is true, in this case of *Minor*, his duties were entirely ministerial. In the case before us, a part of the acts charged and admitted to be true, are ministerial, such as issuing the summons and the execution, and in these, if there was corruption, it cannot be contended that the justice has faithfully discharged the duties of his office. But we are of opinion that, for corruption in a judicial act, he and his sureties are liable on the bond. The language used is general, and it must appear an inadmissible refinement to limit the undertaking to one class of duties to the exclusion of another. The sureties are responsible for all acts of the justice, committed by virtue of his office, and for which, exclusively of the bond, he would be individually responsible (1).

We are therefore of opinion, that the Circuit Court erred in sustaining the demurrer and rendering judgment against the plaintiff.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. H. Farnham*, for the State.

*C. Dewey* and *I. Naylor*, for the defendants.

(1) See *The State ex rel. Robinson v. Littlefield et al*, 4 Blackf., 129.

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[\*76]

\*WAY and Another v. LYON.

**VOLUNTARY CONVEYANCE.**—A *voluntary* conveyance of real estate, though not recorded as prescribed by statute, is valid against any subsequent *voluntary* conveyance of the property executed by the grantor.

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SHERIFF'S SALE.—A purchaser of real estate at sheriff's sale obtains all the interest that the execution-debtor had in the property.

ERROR to the *Bartholomew* Circuit Court.

STEVENS, J.—This was a suit in chancery, and the material facts which it is necessary to notice are these:

In 1824 or 1825, one *Martin Way*, of *Bartholomew* County, in this State, an old man, was the legal owner of a small tract of land, situate, lying and being in the said county of *Bartholomew*, being the north half of the east half of the south-east quarter of section number three, township number nine north, of range number five east; and, about that time, he, for natural love and affection, gave said tract of land to his son *Ira Way*, a man of lawful age, as an advancement, and conveyed the same to him by a deed in fee-simple, which deed is still in existence, not having been obliterated or destroyed, but the said deed has never been recorded.

Between the 10th day of *June*, 1827, and the 29th day of *January*, 1828, the said *Ira Way* became indebted to *James M'Camet & Co.* for merchandise in the sum of twenty-five dollars and twenty-nine cents, for which he gave his note, &c., and judgment was rendered thereon against said *Ira Way* in favour of *M'Camet & Co.*, before a justice of the peace of said county, in the month of *May*, 1828. And the said *Ira Way* afterwards, and before the 16th day of *June*, 1828, became further indebted to the said *M'Camet & Co.* for other merchandise, in the sum of three dollars and one and a-half cents, on which judgment was rendered before the same justice of the peace, in favour of said *M'Camet & Co.*, against said *Ira Way*, on the said 16th day of *June*. After which, on the 21st day of *June*, 1828, transcripts of those judgments were filed and recorded in the office of the clerk of the Circuit Court of the county, and such proceedings were thereupon had, that the said

*James M'Camet & Co.*, at the *September* term of said [\*77] Circuit Court then next following, recovered a \*judgment for execution against the lands and tenements of the said *Ira Way*. Executions were immediately issued, and the said tract of land seized and taken in execution as the land



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of the said *Ira Way*, and on the 4th day of *October*, 1828, was by the sheriff sold, and one *George Lyon*, the defendant in error, became the purchaser, and received a deed from the sheriff for the same.

On the 12th day of *May*, 1828, before the said *M'Camet & Co.* obtained their first judgment against the said *Ira Way*, the said *Martin Way*, the father, finding, as he the said *Martin* says, that his son *Ira Way* was becoming very intemperate, and fearing that the benevolent intentions he had in view would be defeated, and finding that the deed of conveyance which he had made to his said son *Ira Way* had not been recorded, and believing that the deed for that reason was null and void, he, the said father, *Martin Way*, voluntarily, without any valuable consideration, conveyed the said tract of land to his grandchildren, *Ira D. Way*, under the age of eleven years, and *Martin M. Way*, under the age of three years.

All the foregoing facts appear of record, and are confirmed or admitted by both parties.

The bill of complaint alleges, that *James M'Camet & Co.* gave credit to the said *Ira Way*, solely on the faith of his being the owner of said tract of land. This averment is not proved, nor is it admitted or denied by the answer. The bill also charges that the father, *Martin Way*, attempted to convey this land to his grandchildren, as above stated, for the purpose of cheating and defrauding the said *James M'Camet & Co.* out of their claims against *Ira Way*, the son; but this charge is denied by the answer. The bill and answer contain many other matters and things, but we think they have no material bearing on the fundamental principles which govern the case, and therefore it is unnecessary to notice them. Those infants, the grandchildren and second grantees, claim the land under the deed made by their grandfather to them; and the defendant in error, *George Lyon*, who bought it at the sheriff's sale as the property of the said *Ira Way*, the son and first grantee, also claims it under his purchase and the deed of the sheriff.

This case presents to the Court for its consideration two general questions:

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First, was the first deed of conveyance made by [\*78] *Martin*, the \* father and grantor, to his son *Ira Way*, null, void and of no effect, at the time the second deed of conveyance was made to the grandsons, by reason of its not having been recorded?

The laws respecting the conveyance of real estate in the several States are local, and are almost exclusively statutory. The statutes, however, on the subject of acknowledging and recording deeds of conveyance, are substantially the same in most of the States. They, in some instances, differ as to the time limited in which a deed shall be recorded, and, also, as to the officers before whom it may be acknowledged; but when once acknowledged before the proper officer, and recorded within the time limited, the effect is the same in most if not all of the States. In *New Hampshire*, in the case of *Colby v. Kenniston*, 4 N. Hamp., 262, it is held, that he who takes a conveyance of land, knowing that another person has a previous conveyance by an unrecorded deed, is guilty of a fraud and can not hold the land; and where the person who holds the unrecorded deed is in absolute and visible possession, such possession is notice to all the world that he has such unrecorded deed. In *Massachusetts*, in the case of *Marshall v. Fisk*, 6 Mass. Rep., 24, it is decided, that a deed conveying land, but not acknowledged or recorded, transfers the estate to the grantee; and when an attachment is levied, it shall not be defeated by giving up such deed, and the original grantor's giving a new deed to a third person; it is fraud upon the creditor. In the *United States* Supreme Court, in the case of *Findlay et al. v. Hinde et ux.*, 1 Pet. Rep., 241, it seems to be settled that a deed of conveyance once properly made and delivered, will be good against and will bind the party making it, his heirs, and all other persons, except *bona fide* purchasers for a valuable consideration without notice, although it is neither acknowledged or recorded. The same principle is settled in *New York* in the cases of *Jackson v. Sharp*, 9 Johns. R., 163, and *Jackson v. West*, 16 Johns. R., 466. By the statute of our State, a deed of conveyance, if made within the State, is valid and binding without either

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acknowledgment or record, between the grantor and grantee, and against all other persons, except purchasers for a valuable consideration, &c. Rev. Code, 1824, p. 333, sec. 8; Rev. Code, 1831, p. 270, sec. 7. And such appears to be the statutory provisions in all other States. 4 Kent's Comm., 448 (1).

The bill and answers are remarkably inaptly drawn, [\*79] and are \*defective as it respects possession and notice;

but the second grantees being purely volunteers, and standing in this case on the same footing that volunteer strangers stand, being grandchildren, and therefore the consideration of love and affection, as a meritorious consideration, can only in some particular cases be extended to them, and this not being such a case, it is immaterial who was in possession, or whether they are affected with notice or not. They can not take any advantage of the first grantee, in consequence of his deed not having been recorded. The deed, as to that objection, is good against all the world, except *bona fide* purchasers for a valuable consideration, or creditors of the grantor.

Secondly, can a grantor revoke his own voluntary deed of conveyance, by his own act for that purpose, so as to convey the same estate to an after voluntary grantee, by a second deed of conveyance?

In the State of *Ohio*, in the case of *Burgett v. Burgett*, 1 Ohio Rep., 478, it is considered as settled doctrine, that a voluntary conveyance is not void, but that it is good against all except creditors, or *bona fide* purchasers for a valuable consideration. In the case of *Randall v. Phillips et al.*, 3 Mason, 378, a voluntary conveyance is considered good and binding on parties and privies. In the case of *Bunn v. Winthrop*, 1 Johns. Ch. Rep., 329, it is said that a voluntary conveyance, though retained by the grantor in his possession until his death, is good and binding. The Court in the case of *Reichart v. Castator et al.*, 5 Binney, 109, says, that a deed made to defraud creditors is good against the grantor and his children. The Chancellor, in the case of *Souwerbye v. Arden*, 1 Johns. Ch. Report, 240, considers that a voluntary conveyance, fairly made, is always binding in equity upon the grantor; and, if he retain such deed in his possession,

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there must be other circumstances, besides the fact of his retaining it, to show that it was not intended to be absolute, or it will be binding. In the case of *Boughton v. Boughton*, 1 Atk. Rep., 625, the Lord Chancellor says, that a voluntary deed, kept by the grantor and never cancelled, will not be set aside by a will or an after voluntary conveyance.

In the case of *Villers v. Beaumont et al.*, 1 Vern., 100, the grantor, *William Beaumont*, a short time before his death, at an ale-house, voluntarily, on a little scrap of paper under his hand and seal, settled an estate upon his cousins. After-  
[\*80] wards, being \*dissatisfied, he made his will in writing, devising the same estate to his half-brother. The Lord Chancellor, at the hearing, said there was not even colour in the case. He said, if a man will improvidently make a voluntary deed, and not reserve in it a power of revocation, the Court will not loose the fetters he has voluntarily put upon himself; he must lie down under his own folly; for, if relief be granted in such cases, it will establish the absurd proposition that a man can make no voluntary disposition of his estate but by will. In the case of *Bale v. Newton*, 1 Vern., 464, the testator made a voluntary conveyance of part of his estate, and afterwards made a will, by which he charged the same part of his estate with the payment of some debts. Upon the hearing the Chancellor said, the settlement, although voluntary, is not revocable, and therefore the grantor, by his voluntary conveyance, disabled himself to charge the estate. In the case of *Arundell v. Phillpot*, 2 Vern., 69, Mrs. *Phillpot* made a voluntary conveyance of her estate, and reserved in the deed a power of revocation, on the payment or tender of a guinea. Afterwards she became dissatisfied with the grantee, and conveyed the same estate to her eldest son, subject to the payment of some debts, but never paid or tendered the guinea to the first grantee. The counsel contended, that the first grant was revoked under the power retained in the deed for that purpose, and that, although they could not prove the payment or tender of the guinea, yet that the making of the second deed was evidence of the revocation of the first. But that was not allowed. The



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first deed held the estate. In the case of *Clavering v. Clavering*, 2 Vern., 473, the grantor, in 1683, made a voluntary settlement of his estate, but he never published it to the world; he kept it himself, and it was found after his death among some old papers. In 1690, seven years after making the first settlement, he made another voluntary settlement, and settled the same estate on his eldest son. This last settlement he often spoke of during his life, but never was heard to speak of the first. He often told his tenants that, after his death, his eldest son was to be their landlord; yet the first conveyance held the estate.

The foregoing are a few only of the numerous cases in the books, which tend to the establishment of the same doctrine, but it is useless to travel over the whole of them. It perhaps may be correct to notice one other leading case—that [\*81] is the \*case known in the books by the name of *Lady Burgh's Case*, reported in *Moore*, and commented on by *Roberts*. In this case, *Lady Burgh* made a voluntary conveyance of her estate to a stranger, and, afterwards, she made a second voluntary conveyance of the same estate to a nephew, founded on natural love and affection, with the laudable design of providing for a family. The Chancellor sent the case to the judges for their opinion, and they decided that the first conveyance held the estate. They said a second attempt to convey the same estate, without absolute valuable consideration from a *bona fide* purchaser, was wholly abortive; there being no estate in the grantor to convey.

*Roberts*, *Maddock*, *Fonblanque*, and other law writers, lay it down as well settled, that voluntary conveyances are always binding on the party who makes them, his heirs, and all others, except creditors and *bona fide* purchasers for a valuable consideration; that neither the grantor, his heirs, or volunteers holding under him, can, by any act of theirs for that purpose, avoid such voluntary conveyance, they being as much bound by it as they would be, had the most valuable consideration been given, notwithstanding the deed or conveyance may have, for that purpose, been cancelled; that nothing less than *bona*

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*vide* purchasers for value, or creditors, can set aside and avoid a precedent voluntary deed; that a voluntary conveyance, without a reserved power of revocation, cannot be revoked, unless there is clear and decisive proof that the grantor never intended to deliver the deed; but that the simple fact of his retaining it in his possession until his death, is not of itself sufficient to prove that he did not intend it to be absolute; that equity never interferes with or aids adverse claimants, where there is no fraud, and all the parties are purely volunteers; and in all cases where equities are equal, courts will not interfere; the legal title is suffered to remain where it is found; and in cases where persons claim under titles purely voluntary, if there is no fraud, the one holding under the eldest title has the estate at law, and will hold against the subsequent grantees, both at law and in equity (2).

In this case, *Lyon*, the defendant in error, stands in the shoes of *Ira Way*, the son and first grantee, and is clothed with all his right, title, claim and demand, either in law or equity, to the land in question, and if the second grantees cannot defeat

his claim, they cannot defeat the claim of *Lyon*, who [\*82] holds under \*him. The conveyance and title of the

first grantee is not only the eldest, but also the most meritorious, it being the advancement of a father to a son; and therefore *Lyon*, who holds under this conveyance, will hold the estate both at law and in equity, against the grantor, his heirs, and all subsequent volunteers. Such is the decree of the Circuit Court, and that decree must be affirmed.

*Per Curiam*.—The decree is affirmed with costs.

*J. Whitcomb*, for the plaintiffs.

*P. Sweetser*, for the defendant.

(1) A subsequent purchaser, *with notice* of an unrecorded deed, cannot object to the prior deed on the ground of its not being recorded. *Ricks v. Doe*, Vol. 2 of these Rep., 346.

(2) In *England*, the law is settled by several modern decisions, that "a voluntary conveyance of land without valuable consideration, is fraudulent and void as against a subsequent purchaser, under the statute of 27 *Eliz.*, c. 4, without any finding of a fraudulent intention, and though he had notice of the prior conveyance." 2 Stark. Ev. 358; 1 Madd., 271; 2 Hov., 74. The Su-

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preme Court of the *United States* (*Baldwin, J.*, dissenting) have refused to go so far. The Chief Justice, after observing that the modern *English* decisions are as above stated, and that they ought not to be followed says: "The universally received doctrine of that day (time of the *American* revolution), unquestionably went as far as this: A subsequent sale, *without notice*, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud; which threw on those claiming under such settlement, the burthen of proving that it was made *bona fide*. This principle, therefore, according to the uniform course of this Court, must be adopted in construing the statute of 27 *Elizabeth* as it applies to this case." *Cathcart et al. v. Robinson*, 5 Peters, 264, 280.

## CHESROUND v. CUNNINGHAM and Others.

**OCCUPYING CLAIMANT.**—The claim of an occupying claimant for the value of his improvements, on a recovery against him in ejectment, does not grow out of any common law right, but is entirely of statutory origin.

**TRESPASS—PLEADING.**—The defendant in trespass for *mesne* profits, after a recovery against him in ejectment, cannot plead in bar of the action that the rents and profits, &c., do not exceed the value of his improvements, unless such value had been assessed under the direction of the Court that rendered judgment in the action of ejectment.

[\*83] **\*TENANTS IN COMMON.**—One tenant in common may sue separately in ejectment for his undivided share of the estate.

**ERROR** to the *Clark* Circuit Court.

**BLACKFORD, J.**—*Chesround* brought an action of trespass for *mesne* profits against *Cunningham* and others, after a recovery in ejectment. The *locus in quo* is described as being an undivided third part of four hundred acres of land. The defendants pleaded in bar as follows: That they purchased the freehold in 1820, at a public sale for the non-payment of taxes; entered into possession of the land as their own: and received the rents and profits. The plea also states, that the defendants had made lasting and valuable improvements on the premises, before the commencement of the action of ejectment, to the value of \$1,000, of which the plaintiff had notice, and which value he had failed to pay. The plaintiff replied,

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that at the *October* term of the *Clark* Circuit Court, 1829, in an action of ejectment by the lessee of the plaintiff, the defendants were adjudged guilty of the trespass in the declaration mentioned; and that their plea, against the record of that judgment, ought not to be admitted. The defendants demurred to the replication, and the Circuit Court sustained the demurrer, and gave judgment for the defendants.

We think the plea, in this case, is bad. The occupying claimant law of 1824, on which the plea is founded, will not support it. That law enacts, that in certain cases where an occupying claimant has made improvements, the court rendering judgment against him on an adverse claim, shall, at the request of either party, appoint three commissioners to value the improvements, and also to value the land without the improvements. It has been decided, however, that instead of commissioners, a jury must be impaneled in these cases. *Armstrong v. Jackson*, Nov. term, 1825. And the statute of 1831 expressly requires the assessment to be by a jury. The statute further enacts that the successful claimant in all such cases, may, at his election, either demand the value of the land without the improvements, and let the occupying claimant keep possession, or may pay the value of the improvements so as aforesaid assessed, within the time allowed by the Court, and take the premises himself. It further enacts, that if the successful claimant demand the value of the land without the improvements, and the occupying claimant do not pay [\*84] the \*same within such reasonable time as the Court shall allow, a writ of possession may issue.

The act concludes with the following clause: "And in no such case shall the occupying claimant, who may be evicted, be liable to any action or prosecution for or on account of any rents or profits accruing, or waste or damages done to said land, previous to receiving actual notice as aforesaid, of such adverse claim, unless such waste or damages shall exceed the value of the improvements *so as aforesaid to be assessed*, and then only the amount of such excess." This concluding clause of the statute has particular reference to an action, like the one



before us, of trespass for *mesne* profits after a recovery in ejectment; and points out the case in which the defendant can not be made liable. It is this, when the value of the improvements so as *aforesaid* assessed, that is, assessed under the provisions of a previous part of the law, exceed the amount of the rents and profits. That assessment, to be a defense, must have been previously made. The claim for improvements, in these cases, does not grow out of any common law right; but is entirely of statutory origin. The party, therefore, wishing to avail himself of the claim, must proceed under the statute to have his claim established. It must be done by a jury, caused to be impaneled by the court that renders judgment in the action of ejectment.

The plea in this case, to be a valid bar to the action, should aver that the value of the improvements, and of the land without the improvements, had been assessed conformably to the statute; and that the rents and profits for which the action was brought, did not exceed the value of the improvements so assessed, which value remained unpaid. But instead of that, the plea before us merely states lasting improvements to have been made of a certain value, for which the plaintiff had not paid. Admit this plea, and the questions whether the defendant had made any valuable improvements—whether they had been made under the circumstances contemplated by the statute, and what is the value of the improvements—may all be tried in the action for *mesne* profits. Such inquiries the statute does not authorize to be made in this action. They must be made, if made at all, under the direction of the court rendering the judgment in ejectment, and must be connected with, and make a part of, the proceedings in that cause.

The defendants contend that, in this case, the declaration \*85] shows the plaintiff has no right to recover, because his close, alleged to have been entered, is stated to be an undivided third part of a certain tract of land. There is nothing in this objection. One tenant in common may sue separately in ejectment for his undivided share, or in trespass

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for the *mesne* profits. 1 Chitt. Pl., 53. He may even, in these actions, sue his co-tenant. Adams on Eject., 88, 330 (1).

The judgment for the defendants is, therefore, erroneous, and must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*I. Hawk*, for the plaintiff.

*I. Naylor* and *J. H. Thompson*, for the defendants.

(1) "Tenants in common must in general sever in real actions, unless in *quare impedit*, and in ejectment a joint demise would be improper; but in personal actions, as for a trespass or nuisance to their land, they may join, because in these actions, though their estates are several, yet the damages survive to all, and it would be unreasonable, when the damage is thus entire, to bring several actions for a single trespass. Bac. Ab. Joint Tenants, K; 2 Bl. Rep., 1077; 5 T. R., 246; Yelv., 161; Cro. Jac., 231; 2 H. Bl., 386; 5 Mod., 151. A tenant in common may, however, in general sue separately; as in ejectment for his undivided share, or in trespass for the *mesne* profits, or in debt for double value against a person who has held over after the expiration of his tenancy. 5 T. R., 246; 2 Bl. Rep., 1077. In some cases he may sue in ejectment for the whole premises. 3 Moore, 229. But a joint action for *mesne* profits may be supported by several lessors of the plaintiff in ejectment, after recovery therein, although there were only separate demises by each. 5 M. & S., 64; 2 Chitt. Rep., 410;" 1 Chitt. Plead., 75.

"A count upon a joint lease, by tenants in common, is bad. Cro. Jac. 166; 1 Ins., 200; 2 Wils., 232; 12 East, 221. (But *quare*, whether, as a lease is admitted by the consent rule, a lease may not be presumed in which each demised his undivided share. See *Doe v Read*, 12 East, 57; and the observations of Gibbs, A. G.) There should, in such case, be a distinct count upon the separate demise of each tenant in common, or they should join in a lease to a third person, who may take a lease to try the title. 2 Wils., 232;" 2 Stark. Ev., 309.

It is said that one of several parceners may recover her part in ejectment, without the others joining. *Rue d. Raper v. Lonsdale*, 12 East, 39.

"Joint tenants must join in all real and mixed actions, for they have but one joint title and one freehold; and in ejectment the declaration must be upon their joint demise. So, they ought to join in trespass, and other personal actions, where they have a joint interest; so in debt or avowry for rent, 5 Mod. 73; or avowry for damage feasant, 5 Mod. 151;" 15 Petersd., 12.

The doctrine of survivorship incident to joint tenancy is abolished in *Indiana*. Rev. Code, 1831, p. 290.

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Anthony, Administrator, v. M'Call, Administrator.

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[\*86] \*ANTHONY, Administrator, v. M'CALL, Administrator.

EXECUTORS AND ADMINISTRATORS.—An administrator can not be sued for the *devastavit* of his intestate, by an administrator *de bonis non* of the first intestate (a).

ERROR to the *Rush* Circuit Court.

M'KINNEY, J.—This is an action of *assumpsit*. The plaintiff, the administrator *de bonis non* of *Abraham Carey*, deceased, declares against the defendant, administrator of *Samuel Carey*, deceased, for an alleged *devastavit* by *Samuel Carey*, the administrator of the plaintiff's intestate.

The declaration charges that, in 1818, *Samuel Carey*, administrator of *Abraham Carey*, wasted and converted to his own use, goods, &c., of the said *Abraham Carey*, to the value of \$300. That the said *Samuel*, afterwards, to wit: in the year 1826, promised to pay the value of the goods so wasted and converted. Yet neither the said *Samuel*, in his life-time, nor the defendant since, has paid the same, &c. The defendant pleaded three several pleas: 1st, *plene administravit* of the goods, &c., of *Samuel Carey*; 2dly, the statute of limitations; 3dly, *plene administravit* by the said *Samuel Carey*, of the goods, &c., of *Abraham Carey*, deceased. General replications were filed to the 1st and 3d pleas, and issues to the country. To the second plea the plaintiff replied specially, "that the indebtedness of said *Samuel Carey*, deceased, accrued in consequence of the said *Samuel* having appropriated the goods, &c., of *Abraham Carey* to his own use, and that the power of said *Samuel* continued unrevoked until 1828, wherefore, &c., said *Samuel* did promise, &c., within five years." To this replication the defendant demurred. The Court below sustained the demurrer, and rendered judgment in favor of the defendant.

By the demurrer to the replication, the declaration is before us. If it be radically defective, whatever may be the character

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(a) See *The State ex. rel., etc. v. Gooding*, 8 Blackf., 567.

An administrator *de bonis non* has the same rights, and is subject to the same liabilities, as his predecessor. 2 R. S. (G. & H.), p. 489.

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Anthony, Administrator, v. M'Call, Administrator.

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of the replication, the action can not be sustained. By one of the first rules of pleading, an action can only be brought by the person who has the legal right of action. The sufficiency of the declaration must, therefore, depend upon the legal rights and power of an administrator *de bonis non*. He is [\*87] entitled to \*all the goods and personal estate, &c., which remain in specie, and were not administered by the first executor or administrator, as well as to all debts due and owing to the testator or intestate. 3 Bac. Abr., 20; *Tingrey v. Brown*, 1 Bos. & Pull., 310.

The original representative, executor or administrator, is liable for a *devastavit*, but such liability is not enforced, at the suit of the administrator *de bonis non*. The administrations are distinct. Each has peculiar duties and responsibilities. In the event of a *devastavit* committed by either, the heirs, creditors, and others, whose legal rights are affected, by appropriate action, may obtain redress. The administrator *de bonis non*, having no of legal right action, can not be the medium of such redress, unless authorized by a statute.

The 14th section of the act organizing Probate Courts, authorizes that court to remove, for certain causes, an administrator acting under its authority, and to appoint a successor, to whom the person removed is liable to account, according to law, for all acts in the trust. The present case is not within the statute. If it were, the declaration would still be defective. It does not aver to whom the promise of payment was made, nor does it contain those necessary averments that would bring it within the statute.

In the case of *Coleman, Adm'r. v. M'Murdo et al.*, 5 Rand. R., 51, it was decided, that the administrator *de bonis non* could not bring such an action as the present, either at law or in equity.

We think the declaration radically defective, and that the action can not be maintained.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Rariden*, for the plaintiff.

*O. H. Smith*, for the defendant.



## Stevens and Others v. Beckes.

[\*88] \*STEVENS and Others v. BECKES.

**FALSE RETURN—PLEADING.**—Neither the insolvency of the execution-defendant, nor the statute of limitations, can be pleaded in bar to an action against a sheriff for a false return of a *feri facias* (a).

**SAME—EVIDENCE.**—In such an action, in the court that rendered judgment, the minutes kept in a book by the clerk during the progress of the cause and signed by the presiding judge conformably to the statute, is admissible evidence for the plaintiff on the issue of *nul tiel record*.

**ERROR to the Knox Circuit Court.**

STEVENS, J.—This is an action on the case against the defendant in error, for making a false return to an execution of *fi. fa.*, as sheriff of the county of *Knox*. The declaration avers that at the *February* term, 1820, of the *Knox* Circuit Court, the plaintiffs in error, who were plaintiffs below, recovered a judgment before the said court, against one *Willis Fellows*, for \$2,500, with interest thereon from the 16th day of *February*, 1819, together with costs, &c.; that on the 5th day of *April*, 1820, while the said judgment remained unpaid and in full force, an execution of *fi. fa.* issued thereon in favour of the plaintiffs against the goods and chattels, lands and tenements of the defendant, *Fellows*, which was delivered to *Beckes*, the defendant, who was then and there the sheriff of said county; that the said defendant being such sheriff, contriving unjustly, wrongfully and deceitfully to injure the plaintiffs, neglected and failed to execute the writ, and on the return day thereof, “falsely, fraudulently and deceitfully returned that the debt, interest and damages had been duly replevied,” &c.; which return is a matter of record, &c.; and that in

[\*89] truth \*and in fact the said debt, interest and damages had not been so replevied.

The defendant pleaded in bar four several pleas—1st, not guilty; 2dly, that *Fellows*, the execution-defendant, was and is totally insolvent, &c.; 3dly, the statute of limitations; and

(a) See *The State ex rel. etc., v. Youmans*, 8 Blackf., 90.

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4thly, *nul tiel record*. To the 1st plea an issue to the country is joined; to the 2d plea a replication of estoppel is filed, which is demurred to, and the demurrer is overruled by the Court; to the 3d plea a demurrer is filed and sustained; and to the 4th plea, issue is joined, with an agreement of record that the issue of *nul tiel record*, so joined on the 4th plea, should be submitted to and tried by the same jury that should try the other issues; and that all error was waived, as to trying that issue by the jury; and that at the trial thereof, the defendant should not object to any variation in date, words, figures, or letters, between the judgment, execution and return thereto, set out, and those which might be produced in evidence. A trial was then had, and a verdict and final judgment rendered for the defendant.

It also appears of record that, on the trial before the jury, the plaintiffs offered in evidence to the jury the following entry of judgment, upon the minute book of the court, it being a judgment rendered at the *February* term, 1820, of said court, duly signed by the presiding judge of said court, and the same judgment upon which the execution in question issued, which entry of judgment is in these words and figures: "*February* term, 1820. *Luther Stevens, George Evans, Mark Stackhouse, and Mahlon Rogers*, assignees of *Arthur Patterson and Samuel Chambers*, v. *Willis Fellows*. Debt, \$2,500; damages, \$3,000. Parties appeared by their counsel, and the plaintiffs filed their demurrer to the plea of the defendant, and after argument had, the Court sustain the demurrer; to which opinion of the Court, the defendant by his counsel excepts and files his bill, &c.; therefore, on motion, it is considered that the plaintiffs do recover of the defendant the sum of \$2,500, with interest thereon from the 16th day of *February*, 1819, being the debt in the declaration mentioned, together with their costs and charges by them about their suit in this behalf expended, and the defendant in mercy," &c. To the introduction of which entry the defendant objected, and the

[\*90] Court sustained \*the objection, and refused to let the entry go to the jury as evidence.

The first point is, did the Court err in overruling the demurrer to the plaintiffs' replication to the defendant's second plea?

It is not necessary to examine the position, taken by the plaintiffs, respecting their replication of estoppel to the defendant's second plea, for, admitting the replication not to be well pleaded, still the demurrer was correctly overruled, the plea to which the estoppel was replied being bad. The insolvency of the execution-defendant can not, in any case, justify a false return; nor can such plea be a bar to an action for a false return.

The second point is, did the Court err in sustaining the demurrer to the third plea?

The only question is, whether our statute of limitations can be pleaded to an action against a sheriff for a false return to a writ of execution? The statute enacts that "all actions of debt on simple contract, and for rent arrear, actions on the case other than slander," &c., "shall be commenced within five years after the cause of action accrued, and not after." It then provides in the same section, that "no statute of limitations shall ever be pleaded as a bar, or operate as such, to any action founded on an instrument or contract in writing, whether the same be sealed or unsealed." The words of the statute of limitations, 21 *Jac.* 1, c. 16, are, "that all actions upon the case shall be brought within six years ensuing the cause of action, *and not after*;" and *Ballantine*, in his commentaries upon that statute, states it as a settled point, that an action against a sheriff for a malfeasance in the execution or return of a writ of execution, is not within the statute, it being founded on matters of record. *Bal. on Lim.*, 92, 96. The words of the statute of the State of *Maryland*, as it stood in the year 1790, are the same as the statute of *James*, and it was settled in both the General Court and Court of Appeals, after the most solemn arguments, that an action on the case, against the sheriff for an escape upon a *capias ad respondendum*, was not within the statute. 2 *Harr. & M'Henry*, 401, 408. In the statute of the State of *New York* of 1817, the words are, "that all actions upon the case, founded upon any contract without specialty, shall be commenced and sued within six

years," &c. Under that statute, it was settled that an [\*91] action \*of assumpsit on a judgment of a justice of the peace was not within the statute: the Court says, whether a justice's court is strictly a court of record or not, is not material; for if it be not, it is still conclusive evidence of a debt, and its truth cannot be questioned while it remains in force, and therefore stands on the foot of specialties. *Pease v. Howard*, 14 Johns. Rep., 479.

Our statutes of 1818, 1824, and 1831, each require that the clerks of the Circuit Courts shall enter on their execution books "every execution at the time it issues, noting in separate columns the names of the parties, the day it issues, the endorsement containing a statement of the debt, damages, interest, and costs, and whether replevied or not, the return day, to whom directed, to whom delivered, the officer's return, and the day it is made, at full length, and shall make the like entries on issuing an *alias* or *pluries* execution, which book and the entries therein, made as aforesaid, shall be taken as matters of record."

The suit now before us is founded on a judgment, a writ of *fi. fa.* thereon, and the sheriff's return to that writ, all in writing, and, by virtue of the above recited statute, are matters of judicial record, which brings the case clearly within the above noticed proviso of the statute, that takes out of the statute all actions founded on an instrument in writing, whether sealed or unsealed. It would appear absurd, indeed, to contend that in an action on the case founded on an unsealed instrument in writing, the statute of limitations cannot be pleaded, because the foundation is in writing, but that in a like case, founded on writings which are matters of judicial record, the statute can be pleaded. The demurrer was correctly sustained.

The third and last point is, did the Court err in rejecting the original entry of the judgment declared on and set out in the declaration, as evidence?

On this point the Court has no doubt. These minutes can be correctly used in the same court in which they are made. The



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statute requires each day's proceedings to be drawn out at full length, and read over and signed by the court; and they are, when so drawn up, read and signed, the solemn judgment of the Court. No other or further judgment is ever signed. The complete record is the act of the clerk in vacation, and it must strictly agree with the minutes, and if it does not, it can always be amended by the minutes. In *England*, in the case of *Jones v. Randall*, Cowp. 17, it was decided that the [\*92] minutes of \*the judgment of the House of Lords, when sitting as a judicial court, were their solemn judgments, and might be used as such, by transcript or otherwise, in any court in the kingdom. The Court erred in refusing the minutes in question, as evidence of the judgment set out in the declaration. Whether that judgment was reversed or not is another question entirely, and not now before us.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*E. Huntington* and *C. Dewey*, for the plaintiffs.

*S. Judah*, for the defendant.

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PRINCIPAL AND SURETY.—*Seire facias* by the executors of *A* against *B* and *C*, to have execution against them on a replevin-bond executed by *B* with *C* his surety, and payable to the testator. Plea by *C*, that the testator in his life-time took out a *fieri facias* against the defendants on the bond, and placed it in the hands of the sheriff, but withdrew it, without *C*'s consent, before it was levied; that whilst the execution was in the sheriff's hands, *B* had sufficient property out of which the money could have been made, and that he afterwards became and still continued to be insolvent. *Held*, on demurrer, that the plea was insufficient. *Held*, also, that the mere delay of a creditor in not proceeding at law against the principal debtor, is no defense to a suit against the surety (*a*).

EXECUTORS AND ADMINISTRATORS.—Letters testamentary or of administration granted in another State were not recognized here, by the statute of

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(a) See *Harter v. Moore*, 5 Blackf. 397; *Carr v. Howard*, 8 Id., 190.

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1824, until recorded in the Circuit Court of this State; but they are now so recognized, under the statute of 1831, upon their being filed with the clerk of the court in which they are to be introduced (b).

APPEAL from the *Clark* Circuit Court.

BLACKFORD, J.—A writ of *scire facias* was issued in favour of *Richard Moody*, executor, and *Polly Moody*, executrix, of the estate of *John Moody*, deceased, against *Isaac Naylor* and *William H. Moore*. This writ states that, in 1822, *John Moody*, the plaintiffs' testator, recovered a judgment against *Moore*, for a certain sum of money, in the *Clark* Circuit Court; and that, in 1823, the judgment was replevied by *Moore* with *Naylor* as his surety. It also states the subsequent death of *John Moody*, the judgment-creditor, and the appointment of the plaintiffs as his executors. The object of the *scire* [\*93] *facias*, is to obtain an award of execution against *Moore* and *Naylor* on the replevin-bond. The writ was returned with an acknowledgment by *Naylor* of service on him, and that *Moore* was a non-resident.

*Naylor* appeared to this *scire facias*, and pleaded three pleas in bar: First, that the plaintiffs' testator, in 1823, had taken out an execution of *fieri facias* against *Moore* and *Naylor* on the replevin-bond, and placed the same in the hands of the sheriff; that the testator afterwards, without *Naylor's* consent, directed the sheriff not to serve the execution, and it was accordingly returned *not executed*; that whilst the execution was in the sheriff's hands, *Moore* had sufficient property out of which the money could have been made, and that he afterwards became, and still continued to be, insolvent. To this plea there was a general demurrer, and judgment for the plaintiffs. The second plea is, that the plaintiffs' testator failed to take out execution, from the expiration of the time given by the replevin-bond until the 4th of *November*, 1824; and that, during all that time, *Moore* had sufficient property out of which the money could have been made. There was also a demurrer to this plea, and judgment thereon for the plaintiffs. The third plea is, that the plaintiffs

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(b) See on this subject *Lucas v. Tucker*, 17 Ind., 41.

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are not executors. On this plea the plaintiffs joined issue. On the trial of the cause, the plaintiffs, to prove themselves executors, offered in evidence letters testamentary granted to them by a court in *Kentucky*, together with an endorsement of a certificate by the clerk of the Circuit Court of *Clark County, Indiana*, that the letters had been recorded in the Probate Court of that county, on the 9th of *July*, 1830. This evidence was objected to; but the objection was overruled, and the evidence admitted. The Circuit Court, to which the cause was submitted on this evidence, awarded execution on the replevin-bond, according to the prayer of the *scire facias*. From that judgment there is an appeal to this Court.

The first question, presented by this case, is as to the validity of the first plea.

The foundation of the defense is, that the withdrawal of the joint execution against *Naylor* and *Moore* was an injury to *Naylor*, of which he has a right to complain. The plea does not aver, that this joint execution was so framed or endorsed as to require the sheriff, by virtue of the statute, to levy it first on the property of the principal debtor. It must be considered, therefore, as a common execution against two judgment-  
[\*94] debtors, \*and subject to be levied upon the property of the one or the other, as the sheriff might prefer or the creditor direct. But had the *fieri facias* been against *Moore* alone, and founded on a separate judgment against him, there are several strong cases to show, that the withdrawal of such an execution by the creditor *before it was levied*, would be no discharge to *Naylor*, the surety.

In the case of *Halford v. Byron*, the principal assigned a judgment against a third person as a security for the debt. The creditor afterwards permitted the judgment-debtor to pay a part of the money to the original judgment-creditor. The surety complained of this, and required to be exonerated to the amount of that payment. The Chancellor, however, said, that the assignment was but of a judgment as a further security for the money due on the bond, and as the obligee had got it, so he might release or discharge it as he thought fit, and

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*the surety is not hurt by it.* But he said it would be otherwise, if the money had been once paid to the obligee, and then lent again to the principal debtor. Prec. in Ch., 178; 2 Eq. Cas. Abr., 188. It is laid down in *Pothier*, that the pursuits of the creditor against the principal debtor do not liberate the surety, who remains always obliged until payment. Therefore, the creditor may abandon his pursuits against the principal debtor, to sue the surety. But in general, he may oppose to him the exception of discussion. 1 Pothier, 232. The creditor, having commenced a suit against the principal debtor, may afterwards discontinue it, without affecting the sureties' liability. *Fulton v. Matthews et al.*, 15 Johns. R., 433. The payee of a promissory note made by a principal and surety, sued the principal on the note, and, under the statute of *Massachusetts*, attached sufficient property to satisfy the debt. The suit was afterwards discontinued, and the property attached given up, against the remonstrance of the surety. This proceeding was held to be no defence to the surety in a subsequent suit against him on the note. *Bellows v. Lovell*, 5 Pick., 307.

The holder of a promissory note recovered separate judgments against the maker and indorser of the note, and afterwards took out a *fiery facias*, by the indorser's request, on the judgment against the maker, who had sufficient property to pay the debt. This execution, after being placed in the hands of the marshal, was recalled, before a levy, by the

[\*95] holder of the \*note; and the maker became insolvent.

Under these circumstances, the endorser applied for an injunction of the judgment against him on the note; but the injunction was refused. The following is the language of the court: Although the original undertaking of an endorser of a promissory note be contingent, and he cannot be charged without timely notice of non-payment by the maker, yet when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not as he pleases, on the judgment against the maker, without affording any cause of complaint to the en-



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endorser; or if he issues an execution, he is at liberty to make choice of the one which he thinks will be most beneficial to himself, without any consultation whatever with the endorser on the subject; nor ought he to be restrained, by any fear of exonerating the endorser, *from countermanding the service of any execution which he may have issued*, and proceeding immediately, if he chooses, on the judgment against the endorser. And the reason is obvious, for, by the judgment, they have both become principal debtors, and if the endorser suffers any injury by the negligence of the judgment-creditor, it is clearly his own fault, it being his duty to pay the money, in which case he may take under his own direction the judgment obtained against the maker. *Lenox v. Prout*, 3 Wheat. Rep., 520. This last case cited, if it be received as law, settles the present case against *Naylor*, the plaintiff in error. It shows that *Moody's* delivering to the sheriff a *fiery facias*, were it even against *Moore* alone, and countermanding it before levy, is no discharge to *Naylor*, the surety.

The doctrine both at common law and in chancery, in the case of ordinary bonds for the payment of money, is, that where sureties join in a joint and several bond, they make themselves principal debtors to the obligee. The debt is presumed to be created upon the credit given to the sureties, as well as upon that given to the principal debtor. As between the obligors and obligee, all the obligors are principal debtors, though, as between each other, they may have the rights and remedies resulting from the relation of principal and surety. As long as the creditor does no act varying the terms of the original contract, he has the same claim upon the sureties that he has upon the principal, both at law [\*96] and in equity, for the payment of the \*bond. *Berg v. Radcliff*, 6 Johns. Ch. R., 302; *The East India Company v. Boddam*, 9 Ves., 464.

The principal cases in which sureties have been relieved, are where the creditor, by giving further time to the principal for payment, has changed the original contract to the injury of the surety. The giving of further time to the principal

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changes the contract of the surety to his injury in this way: The surety has a right, as soon as the debt is due by the original agreement, to pay the debt and sue the principal for the amount, or to compel the creditor, by a bill in chancery or by a notice under the statute, to sue the principal. But if, by a valid contract, further time for payment be given, the surety's hands are tied up. The principal is secure from arrest until the additional period for payment is expired; and, in the meantime, he may become insolvent. Courts of law, therefore, following courts of equity, have said: That the creditor by thus changing the original contract to the surety's injury, and without his consent, discharges the surety altogether. *Nisbet v. Smith*, 2 Bro. Ch. Rep., 579; *Samuell v. Howarth*, 3 Merivale, 272.

The case before us does not, certainly, come within this principle. *Naylor's* original situation is not changed. He had the same right after the execution was countermanded that he previously had, to enable himself to take out an execution against *Moore*, or to compel *Moody* to do so. His hands were not tied up until a further time for payment had expired. As *Moody* was left entirely free to proceed against the principal or not, it would seem that he might sue out an execution on the bond or not, as he pleased, or that, after suing out an execution, he might withdraw it before it was executed, and take out another of the same or of a different sort, or none at all, at his discretion, without affecting the surety's liability. *Naylor* had bound himself in a replevin-bond, having the effect of a judgment, for the payment of a judgment previously recovered against *Moore*, and it was consequently the business of *Naylor*, and not that of *Moody*, to see that *Moore* paid the debt. *Wright v. Simpson*, 6 Ves., 734. If *Naylor* chose to be passive, and to neglect to have an execution levied on *Moore's* property until there was none to levy on, the fault is his own, and he must bear the loss.

It is contended that the *feri facias* was a lien on [\*97] *Moore's* goods, \*and that the relinquishment of that lien was an injury to *Naylor*. It is not easy to dir-

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cover the principle upon which the relinquishment of this lien can be complained of by *Naylor*. The lien created by the delivery of the *feri facias* to the sheriff, did not change the property of *Moore's* goods; nor was it a satisfaction of the whole or of any part of the debt. The goods of *Moore* might have been subsequently destroyed, or removed to places unknown, by himself or a stranger, and the benefit of the lien thus entirely lost. The sheriff, in such case, could not sue the wrongdoer; nor would the creditor have any remedy against the sheriff, or anybody else, for the loss of the goods. *Hotchkiss v. M'Vickar*, 12 Johns. Rep., 403. The relinquishment of so imperfect a lien is not like the giving up of funds, actually placed by the principal in the creditor's hands to be appropriated to the payment of the debt, nor like goods placed in the custody of the law for that purpose *by the actual levy of a fieri facias*. In these cases of actual possession of the principal's goods, the creditor is viewed as a trustee for the surety, and the relinquishment of the possession is a breach of trust. But we know of no case, and presume there is none, which extends this doctrine of trust in the creditor for the surety's benefit, beyond where the goods are actually in the hands of the creditor, or in the custody of the law.

The leading case, relative to the surety's discharge by the creditor's giving up the means in his hands of reimbursing himself, is that of *Law v. The East India Company*, 4 Ves., 824. In that case, the company, having money and effects of the principal debtor actually in their hands, more than sufficient to pay themselves, delivered the same over to his administrators; and the language of the Court is, that where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety cannot be called upon. Mr. Fell, in his treatise on guarantees, after citing this case in 4 Ves., to show the general doctrine on the subject, says that, to effect the discharge, there must be a parting with something actually in the power and possession of the party, and not the consenting to waive the receipt of a payment or security, never

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in his actual possession; and, in support of this position, he cites the case of *Halford v. Byrom*, to which we have already referred.

In accordance with the principle in the case of *Hal-[\*98] ford v. \*Byrom*, it may be said as to the one before us, that it is not where there is an imperfect lien resulting from the mere circumstance of a *feri facias* being in the sheriff's hands, but that it is only where the goods are *in the custody of the law by their actual seizure on the execution*, that the surety can complain that the execution has been withdrawn. In the cases of *Jones v. Bullock*, 3 Bibb, 467, *Baird v. Rice*, 1 Call, 18, and *Dixon v. Ewing*, 3 Ohio Rep., 280, as well as in the others to which we have been referred, there had been *an actual levy of the execution*; and it was on that ground that the sureties were discharged. But in the case of *Lenox v. Prout*, which we have already cited, there had been no levy, and the surety could obtain no relief. The case of *Lenox v. Prout*, is referred to with approbation by Chancellor *Kent*, in a case where the bail to an arrest, after judgment against them, complained of the creditor's subsequent want of diligence against the principal debtor. The Chancellor says: "I am not aware of any case, which has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, *after judgment and execution* against the bail or the surety. It becomes then too late to inquire into the antecedent relations between the parties. Those relations became merged in the judgment. This was expressly declared to be the case as between the holder and maker, and endorser of a promissory note, by the Supreme Court of the *United States*, in *Lenox v. Prout*, 3 Wheat., 520; and I cannot perceive that the plaintiffs (the bail) have any greater privileges after judgment against them, in consequence of their original character as bail, than the party had in the case cited, who was originally an endorser without consideration." *Bay v. Tallmadge*, 5 Johns. Ch. Rep., 305, 315.

The most of the observations we have thus far made, and



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of the authorities cited, relate to the case of a separate judgment and a separate execution against the principal debtor. That case is more favorable to the surety than the one before us. There were here no judgment and execution against the principal alone; but the bond having the effect of a judgment, and the execution, were against the principal and surety jointly. The surety's defence is, that the failure to have the execution against himself and the principal executed, was an injury to the surety, and he is therefore discharged. This defence [\*99] seems \*liable to a short and conclusive answer, viz.: that it is not shown that the withdrawal of the execution injured the surety. The *feri facias* in question was a joint one against *Moore* and *Naylor*, and might have been legally executed by direction of the creditor, or by the will of the sheriff, upon the property of *Naylor* alone, and would have been so executed, for any thing that appears, had it not been withdrawn. It is impossible then to say, that the bare fact of the non-execution of this joint *feri facias* against *Moore* and *Naylor*, was necessarily an injury to *Naylor*. This obvious objection to the defense, viz.: that it does not appear but that the execution would have been executed, had it not been withdrawn, upon *Naylor's* own goods, was attempted, but without success, to be overcome in a late case in *Virginia*, by showing that the sheriff had gone to the house of the principal debtor, and was just about to levy on *his* goods, when the execution was countermanded. The case was as follows:

*M'Kenny's* executors having obtained a judgment and an award of execution, on three several forthcoming bonds, against *Joseph Waller*, the principal, and *Curtis Waller*, the surety, therein bound, sued out thereupon three writs of *feri facias*, dated in *April*, 1822, and returnable to the *June* term following. These executions were put into the hands of the sheriff. *Joseph Waller*, the principal, had, at the time, personal property in his possession, amply sufficient to satisfy the whole debt; and the sheriff went to his house, three days before the return day, for the purpose of levying the executions on *his* property then and there, with the avowed design to take it

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into his own keeping, when *Joseph Waller* prevailed on the creditors to give him a short indulgence, and they, at his instance, without the consent or knowledge of *Curtis Waller*, the surety, gave written instructions to the sheriff not to levy the execution till they should see him. These were the terms of the instructions: the creditors not binding themselves to suspend proceedings for any time, but giving a mere indulgence to be determined at their own pleasure. In consequence of the instructions thus given him, the sheriff forebore to levy the executions, and made return on them—"not executed by order of the plaintiffs." Very shortly afterwards, *June 7, 1822*, *M'Kenny's* executors sued out new writs of *fieri facias*; but, after these new executions were put into the sheriff's hands, *Joseph Waller* removed the greater part [\*100] of his effects out of the county, and beyond the reach of the process; so that the sheriff could not find enough of *his* property to satisfy the amount of the three executions. What he could find of it he took; and then for the residue of the debt, he levied the process on the property of *Curtis Waller*, the surety. Upon these facts, *Curtis Waller*, the surety, applied to a court of chancery to enjoin *M'Kenny's* executors from proceeding any further on their executions against *him*. The Court of Appeals decreed that there was no ground whatever for the relief prayed for by the surety, and that the bill should be dismissed. *M'Kenny's Executors v. Waller*, 1 Leigh's Rep., 434.

Upon the authority of this case, and upon the others we have referred to, as well as upon the general principles which we conceive to prevail in regard to principal and surety, we have come to the opinion, that the plea of *Naylor* in this case, which we have been considering, cannot be supported. We think that the bare delivery to the sheriff by *Moody*, the creditor, of the *fieri facias* against *Moore*, the principal, and *Naylor*, the surety, and *Moody's* countermanding the execution before a levy, are not of themselves a discharge to *Naylor*, the surety, though *Moore* had sufficient property at the time to pay the debt, and afterwards became insolvent. The opinion of

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the Circuit Court, therefore, sustaining the demurrer to the first plea of *Naylor*, is correct (1).

With respect to the second plea, there can be no doubt. The mere delay of the creditor, in not proceeding at law against the principal debtor, is no defense to the surety. *King v. Baldwin*, 2 Johns. Ch. Rep., 554; *Eyre v. Everett*, 2 Russ., 381. The demurrer to this plea was correctly sustained.

There is one error, however, in the proceedings of the Circuit Court. It is the improper admission in evidence of the letters testamentary of the plaintiffs below. They were granted in another State, and were of no authority here until recorded, agreeably to the provisions of the statute, in a Circuit Court of this State. Rev. Code, 1824, p. 324, 325. The law on the subject is otherwise now; and the foreign letters testamentary or of administration, need only be produced and filed with the clerk of the court in which the suit is to be maintained. Rev. Code, 1831, p. 170, 171. But the case before us is governed by the act of 1824; and as the letters testamentary, produced by the plaintiffs, had not been recorded in a [\*101] Circuit Court \*conformably to that act, they were not admissible to prove the plaintiffs' right to sue as executors. *Naylor v. Moody*, in this court, May term, 1829.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*C. Dewey*, for the appellant.

*J. H. Farnham*, for the appellees.

(1) "If the creditor parts with securities, or any fund, which he would be entitled to apply in discharge of his debt, the surety becomes exonerated, at least, to the extent of the value of such securities; because securities, which the creditor is entitled to apply in discharge of his debt, he is bound either so to apply, or to hold them as a trustee, ready to be applied, should the surety desire it.

Of this principle the case of *Mayhew v. Crickett*, 2 Swanst., 185, affords an exemplification. There a debt was secured by two promissory notes, each for half the amount, of two sureties, and also by a warrant of attorney of the principal debtor, upon which the creditor had entered up judgment, and taken the goods of the debtor in execution, but he afterwards withdrew the execution.

Per the Lord Chancellor, *interlog.*: 'The second ground (in support of

## Nelson v. Zink.

the bill by the sureties) was, that the defendants, by releasing the execution, had relinquished their remedy, at least *pro tanto*. I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle, which prevails both in courts of law and in courts of equity. \* \* \* \* The principle is, that he is a trustee of the execution for all parties interested.'” Theob. on Prin. and Sur., 143.

## NELSON v. ZINK.

**JUSTICE OF THE PEACE—PLEADING.**—To an action of debt before a justice of the peace in *Monroe* township, *Washington* County, the defendant pleaded that he was not resident in that township, nor was the debt contracted there. Held, that the plea was insufficient (a).

**SAME.**—The defense filed before the justice cannot, on appeal, be amended in substance (b).

**ERROR** to the *Washington* Circuit Court. This suit was commenced before a justice of the peace of *Monroe* township, *Washington* County, by *Zink* against *Nelson*.

**M'KINNEY, J.**—This is an action of debt brought on a promissory note, before a justice of the peace. On the calling of the cause before the justice, the defendant pleaded, [\*102] “that he did \*not live in *Monroe* township, *Washington* County, and that there was no debt or claim due by him to *Peter Zink*, contracted in *Monroe* township.” Judgment was rendered by the justice against the defendant for seventy-six dollars, with interest and costs.

The case was taken to the Circuit Court by appeal, and, in that court, the defendant filed a plea in abatement to the jurisdiction of the court. In the plea, he says “that the justice, before whom the suit was tried, ought not to have entertained jurisdiction, because the supposed cause of action did not accrue, and the promissory note, upon which the supposed

(a) *Perkins v. Smith*, 4 Blackf., 299.

(b) *Bastion v. Dalrymple*, post, 365.



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cause of action is founded, was not executed or delivered in the township of *Monroe*, and county of *Washington*, nor was this defendant an inhabitant or resident of said township of *Monroe* aforesaid, at the time of the institution of said suit, nor was he found within the same." The plea was sworn to, and, on demurrer, adjudged insufficient. The defendant then moved the Court for leave to amend the plea, which was overruled and judgment rendered against him.

A bill of exceptions taken to the opinion of the court, presents for our consideration several questions: 1. Had the justice jurisdiction of the case? 2. Could the defendant in the Circuit Court substantially amend or alter the defense relied upon before the justice? 3. Did the Circuit Court err, in refusing leave to amend the plea in abatement?

These questions must be settled by the statute, which defines the jurisdiction and duties of justices of the peace. By the 18th section, "the powers of justices of the peace shall be co-extensive with the townships, in which they may respectively be elected and reside, in civil cases." By the 22d and 23d sections, "no person shall be bound to answer to any summons, &c., issued by a justice, in any civil case, in any other township than the one in which such defendant actually resides, or where the debt was contracted, or where the cause of action accrued, or where the defendant may be found, unless there is no justice who can legally issue such summons," &c.; and jurisdiction is given to the nearest and most convenient justice, if there be none in the proper township, or he be legally interested, or related in certain degrees of consanguinity. The summons in this case was directed to a constable of the proper township, and by him returned, served. The sum claimed, and the defendant, being thus within his [\*103] jurisdiction, the justice could certainly proceed, \*unless the defendant could show, by proper defense, that he was not by the statute within his jurisdiction.

The defense, relied upon before the justice, was not sufficient. The defendant may not have lived in *Monroe* township, nor the debt been there contracted, yet have been within the juris-

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diction of the justice. He has not brought himself within the provisions of the act (1). The statute is drawn with an anxious regard to the prevention of oppression, and confines the jurisdiction of a justice in civil cases to his proper township, and secures to a debtor a forum at his own door, except in those cases in which a denial of jurisdiction would amount to a denial of the means of enforcing the performance of contracts, or of obtaining redress for wrongs sustained. If a defendant be within the provisions of the act, he should rely upon them as a defense. Such a defense, sustained by proof, would deprive the justice of jurisdiction. If the defense be waived, or too limited, the justice may well entertain jurisdiction.

The justice is required by the 26th section, upon an appeal taken, to send up the written statements of the cause of action and defense of the parties, which shall not be set aside by the court, for the want of form, but shall be acted upon by the court, without any substantial amendment or alteration whatever. Consequently, the trial in the Circuit Court must be based on the statements of the cause of action, or defense relied upon before the justice. They are not susceptible of any substantial amendment or alteration (2).

The plea filed in the Circuit Court gives to the defendant a new and distinct defense. It was a departure from that relied upon before the justice, and inadmissible. The Circuit Court was correct in sustaining the demurrer to it. It was also correct in refusing leave to amend.

It is contended by the plaintiff in error that the proceedings before a justice should show on their face that he had jurisdiction. The jurisdiction of a justice is limited, but to require that he should show that his proceedings were within the statute, by negating the grounds by which it might be taken away, is certainly requiring more than a sound construction of the statute warrants, or is reconcilable to settled principles of law.

We are therefore of opinion that the justice had jurisdiction, that the defendant's defense was insufficient, and that the judgment of the Circuit Court is correct.

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Nicholson and Wife, Administrators, v. Carr and Another.

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[\*104] \**Per Curiam*.—The judgment is affirmed with costs.

*J. H. Farnham*, for the plaintiff.

*C. Dewey*, for the defendant.

(1) In some of the counties, no person is bound to answer any summons or *capias ad respondendum*, issued by a justice of the peace in any civil suit, in any other township than the one *in which the defendant actually resides*; except under some particular circumstances mentioned in the act. Stat. 1835, p. 52.

(2) The Circuit Court may permit the plaintiff, in cases of appeal, to amend his cause of action, without changing the form of action, upon payment of costs, &c., with leave to the defendant to amend his defense, &c. And the defendant may, in like manner, be entitled to amend his defense under the same terms, &c. Stat. 1833, p. 112. So, leave may be given to the plaintiff, in such cases, to file additional causes of action, and to the defendant to file one or more statements of defense where none has been filed, or additional statements where any have been filed, under the restrictions above mentioned. Stat. 1836, p. 62.

In suits before a justice, a mistake in the *form of action* shall not be a cause of non-suit, if the cause of action is so stated as to give the defendant full information of what he is called on to answer; nor shall a mistake in the *form of a defense* preclude the defendant from giving any evidence under it according to the justice of the case, provided the defense is so stated as to fully inform the plaintiff what he is to answer. Stat. 1835, p. 52.

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NICHOLSON and WIFE, and Another, Administrators, v. CARR  
and Another, Judges, &c., for the use of HAWN and WIFE.

**PLEADING—EVIDENCE.**—Debt on an executor's bond against the administrators of the surety. The declaration did not aver that the relators were entitled to recover as heirs, legatees, or creditors of the testator, nor that assets subject to the claim had come to the hands of the executor; but it stated that a decree had been recovered by the relators in a suit against the executor. Pleas, performance by the executor, *plene administravit* by him, &c. Issues on the pleas, and verdict for the plaintiff.

*Held* that the defects in the declaration, as to the want of the averments mentioned, were cured by the verdict. *Held*, also, that the decree referred to in the declaration, without a record of the previous proceedings, was not admissible as evidence, and, *semble*, that, independently of that objection, the decree was inadmissible.

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ERROR to the *Clark Circuit Court*.

STEVENS, J.—Debt upon an executor's bond, on the relation of *John Hawn* and *Sarah Hawn*, his wife, against the [\*105] defendants \*as administrators of *James Downs*, deceased.

The material facts are these: On the 12th of *September*, 1822, one *James Downs*, together with *Joshua Redman* and *Isaac Stewart*, bound themselves jointly and severally to pay the plaintiffs \$1,000, conditioned that the said *Joshua Redman* should well, truly, &c., execute the will of *Catharine Stacy*, deceased, make complete inventories and settlements, pay all debts, legacies, &c. After stating the bond, the declaration avers that *Hawn* and wife, on the 23d day of *October*, 1826, by a decree of the *Clark Circuit Court*, recovered against *Redman*, as executor, &c., \$150, &c., which decree is unpaid and in full force, &c., and that execution issued thereon, and was returned *nulla bona*, &c., and breach of payment. These are all the material averments made, to which the defendants pleaded three several pleas. 1st, general performance; 2dly, that *Hawn* and wife had no legacy by the will; and 3dly, *plene administravit*. On which issues were joined, a trial by jury had, and a verdict for the plaintiffs. The defendants moved in arrest of judgment, but the motion was overruled and final judgment rendered on the verdict.

It is contended that the motion in arrest of judgment should have prevailed.

The declaration is clearly defective. The suit is against the administrators of a surety of an executor, and they are only liable for the official defalcations of their intestate's principal. In this case, it is material that it should be averred on the record, that the relators were entitled either as heirs, legatees, or creditors, to the money they demand, out of the estate of *Catharine Stacy*, deceased, and that she died leaving a sufficient estate to pay the same, and that that estate came to the hands of the executor and is subject to the demand of the relators. None of these facts are averred either directly or indirectly; nor is there any direct positive averment of the



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death of *Downs*, or the grant of letters of administration to *Ann Nicholson*; it is possible, perhaps, to infer that such death and grant of letters took place, but the time when, and the place where, can not even be inferred (1). The pleadings and verdict have cured the lack of the averments respecting the death of *Downs*, and the granting of letters of administration to *Ann Nicholson*; but the case is not so clear as to the defects respecting the cause of action. After verdict, it will [\*106] be presumed that all was \*proven that was necessary, if it be stated in the declaration, or is implied from the facts that are stated. *Stennel v. Hogg*, 1 Saund., 228, near the end of note 1; *Craft v. Boite*, 1 Saund., 247, 248, note 3. A verdict will cure ambiguity; but it will not aid a case where the gist of the action is omitted. *Avery v. Hoole*, Cowp. Rep., 825. Our statute of *jeofails*, however, is very broad in providing for the defects a verdict shall cure. After naming many such defects that shall be cured by verdict, it adds, "or for omitting the averment of any matter, without the proving of which the jury ought not to have given such verdict." Under this provision, a verdict will cure the omission of the averment of any matter, which could be legally proved under the issues tried. The issues in this case, as they stand connected with the record, authorize the proof of the matter omitted in averment. The declaration would have been bad on demurrer; but after verdict for the plaintiffs, on the issues joined, we think, under our statute, the defects are cured.

It further appears of record that the defendants objected to the introduction, as evidence, of the decree in chancery set out in the bill of exceptions: 1st, because these defendants were neither parties nor privies to that record; 2d, because the decree does not appear upon its face to be rendered against *Redman* in his fiduciary character; and 3d, because it does not appear to be founded on the same subject-matter in controversy in this suit; but the objection was overruled and the decree went to the jury as evidence. The Court is of opinion that the objections taken to the decree's being given in evidence, were well taken, and ought to have prevailed. We can

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know nothing about the decree, only from what appears of record, and by that must be governed. There is nothing on this record to show us on what that decree is founded, the bill and other proceedings in that suit not appearing. We cannot, therefore, even presume that it is applicable to the case under consideration in this record. Again, these defendants are the administrators of a surety of an executor, and as such are sued on their intestate's bond; and in such case a judgment against the executor has been held not to be evidence. 3 Harr. & M'Henry, 242, in the case of *Beall v. Beck*. The same principle is recognized in the case of *Respublica v. Davis*, 3 Yeates, 128, and in the case of *Dawes, Judge, v. Shed et al.*, 15 Mass. Rep. 6 (2).

[\*107] *Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*I. Hawk*, for the plaintiffs.

*J. H. Thompson* and *I. Naylor*, for the defendants.

(1) A declaration against husband and wife, administratrix before or after marriage, begins as follows: "*John Doe* complains of *Richard Roe* and *Elizabeth* his wife, which said *Elizabeth* is administratrix of all and singular the goods, chattels, and effects, which were of *John Denn*, deceased, at the time of his death, who died intestate, being in custody, &c. For that whereas," &c. 2 Chitt. Pl., 114. For the form of a declaration by husband and wife, administratrix before or after marriage, see 2 Chitt. Pl., 112.

That the relator must have his claim against the estate established by a suit, before he can sue the sureties on the bond, is decided in the case of *Burnett v. Harwell*, 3 Leigh, 89. See, also, *Eaton v. Benefield*, Vol. 2 of these Rep., 52. Rev. Code, 1831, p. 169, sec. 29. And that the declaration on the bond must aver assets or it is bad on demurrer, is decided in *Burnett v. Harwell*, supra. That was an action of debt by the Justices, &c., on the relation, &c., against an executor and his sureties on their bond. Breach, the non-payment of a legacy to the relator, for which legacy a decree had been obtained against the executor. General demurrer to the declaration, because there was no averment that assets to the value of the demand, or, indeed, that any assets had come to the hands of the executor. *Tucker*, President,—  
"The necessity of proof of assets is obvious from the consideration, that if no assets were received, there could be no breach by *devastavit*; and the necessity of establishing, by proof, the amount of assets, is also clear, because it has been repeatedly decided, that the jury must find either sufficient assets or the amount of assets. *Sturdivant v. Raines*, 1 Leigh, 481; *Gardner's Adm'r. v. Vidal*, 6 Rand, 106. This, then, is obviously one of the most essential

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ingredients in the action. It may safely be called, indeed, the very gist of the action. And if it be the important inquiry before the jury, on the trial of the plea of *plene administravit*, or *conditions performed*, it is not less important in the case of a demurrer. For it must be remembered, that upon overruling the demurrer of the defendant to the plaintiff's declaration, a peremptory judgment is pronounced against him for the plaintiffs' demand. If, therefore, the declaration omit what is essential to constitute a right of action, it is impossible to give such judgment without palpable injustice. For, though the demurrer admits what is set forth in the declaration, it does not admit what is not; and hence it is that (sweeping as are the provisions of our statute of *jeofails*) they reach no case of a demurrer for matter of substance. Much, indeed, may be cured by a verdict; but no errors, except those of mere form, are protected from the effect of a demurrer. A further consideration may illustrate the essential character of an averment of assets, in order to enable the Court to pronounce judgment. Even a verdict for the plaintiff for his demand will not justify a judgment of the Court, unless that verdict expressly finds a sufficiency of assets, or the amount of the assets, so as to enable the Court to graduate thereby its own judgment. How, then, the Court can give judgment according to law and the very right of the case, when, so far from knowing the amount or sufficiency of the assets, it does not even know from the plaintiff's own declaration, that the defendant ever received any assets at all, I cannot perceive."

[\*108]   \*(2) But see *Goodwin v. Wilson*, Vol. 1, of these Rep., 344; *The Governor v. Shelby*, Vol. 2, of these Rep., 26; *Eaton v. Benefield*, Id., 52. The *Virginia* decisions were, that the creditor must sue the executor and obtain a judgment against him, and that he must also by a second suit prove that the executor had committed a *devastavit*, before a suit could be brought on the executor's bond. A statute in that State, of 1814, dispenses with the intermediate suit to fix the *devastavit*. So that now there, after judgment against the executor, and a return of *nulla bona*, suit may be brought on the bond *Allen v. Cunningham*, 3 Leigh, 395; and the law is the same in *Indiana*; Rev Code, 1831, p. 169; and in *Massachusetts*; *Coney, Judge, &c., v. Williams*, 9 Mass., 117; and in *New York*; *The People v. Dunlap*, 13 Johns., 437.

## MOORE v. AYRES.

ERROR to the *Allen* Circuit Court.

A defendant in the Circuit Court moved for the dismissal of an appeal from the judgment of a justice in his favor, on the

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ground that the justice had permitted the plaintiff to amend his cause of action after the commencement of the trial. The motion was overruled, and judgment rendered for the plaintiff. *Held*, that it must be presumed, nothing appearing to the contrary, that the amendment was only as to some matter of form, and of course not liable to any objection.

*H. Cooper*, for the plaintiff.

*J. Rariden*, for the defendant.

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 ADDRESS v. THE STATE.

RECOGNIZANCE.—If a person, recognized to appear in the Circuit Court to answer a criminal charge, make default, and the recognizance be declared forfeited, a *scire facias* may issue against the cognizor without the entry of a judgment.

SAME.—A *scire facias* on a recognizance not taken in a court of record, should show by whom it was taken and filed, and that the person who took and filed, was authorized to do so (*a*).

ERROR to the *Shelby* Circuit Court.

STEVENS, J.—Proceedings had by *scire facias* upon a recognizance. The allegations contained in the *scire facias* [\*109] are these: \*That on the 3d day of *January*, 1831, a recognizance was filed in the office of the clerk of the *Shelby* Circuit Court, stating, that on the 19th day of *October*, 1830, *Thomas A. Andress* and *John Andress* personally appeared before one *A. M. Smith*, who signs himself a justice of the peace of said county of *Shelby*, and severally acknowledged themselves to owe to the State of *Indiana*, the sum of \$250 each, to be levied, &c., conditioned that if *Thomas A. Andress* should personally appear at the next Circuit Court, to be holden for the said county on the first day of the

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(a) See *Lang v. The State*, post, 344; *Davis v. The State*, 5 Blackf., 374; *Campbell v. The State*, 18 Ind., 375.



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term, then and there to answer a certain charge of larceny, &c., and abide the judgment of the Court, &c.; and that, afterwards, at a Circuit Court of the county, held in *March*, 1831, the said *Thomas* and *John* were severally called and defaulted for non-attendance, and the recognizance forfeited and made absolute. These are all the substantial allegations the *scire facias* contains. The defendants filed two special pleas in bar, which were demurred to and the demurrers sustained, and final judgment rendered in favour of the State, that she have execution, &c.

Three points are made for our consideration: 1st, that the recognizance is not a judgment on which an execution can issue, and that when the recognizance was forfeited, a judgment should have first been rendered in favour of the State, &c., that she recover the amount named in the recognizance, &c., which was not done, and therefore the judgment and proceedings are erroneous. There is no error in this branch of the proceedings. A recognizance, when forfeited and made absolute, has all the force and effect of a judgment, and is defined by Blackstone to be an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act. It is witnessed only by the record, and not by the party's seal. It is allowed a priority in point of payment, and binds the lands of the cognizor. 4 Bl. Comm., 252. In 6 Bac. Abr., 104 and 108, it is said that a *scire facias* is a judicial writ founded on some matter of record, as a recognizance, &c.; and that a recognizance is considered as a judgment, being an obligation solemnly acknowledged and entered of record. In 2 Tidd's Prac., 982, 983, 984, a recognizance is classed among judgments. If these authorities are correct, no judgment is entered on a recognizance: it stands for a judgment itself, and [\*110] when default is made, a *scire facias* \*at once goes requiring the cognizor to show cause why execution shall not issue.

The 2d point is, that there is no averment in the *scire facias*, showing who filed the recognizance in the Circuit Court, nor

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that it was taken by a person legally authorized to take recognizances. A recognizance not taken by a court of record, is not strictly a record until it is filed and entered in a court of record. 2 Tidd's Prac., 984, 985, 1035. Hence it is a matter of substance, and is material, that a *scire facias*, on a recognizance not taken in a court of record, should aver by whom it was taken and filed, and that the person who took it was legally authorized so to do, and that it thereby became a matter of record of said court, and still so remains, unsatisfied and in full force. This *scire facias*, in this particular, is wholly defective. It nowhere informs us who took, or who filed the recognizance, or that it was taken and filed by a person legally authorized so to do. 2 Marsh. Rep., 132; Lilly's Entries.

The 3d and last point is, that the Court erred in sustaining the demurrers to the defendant's pleas in bar. These pleas are clearly defective, but the demurrers go back to the first error. They search the *scire facias*, and whole record, and locate themselves at the first substantial defect. A *scire facias*, although a judicial writ, must be considered as an original action, to which the defendant may plead, and therefore must contain a legal cause of action on its face. 6 Bac. Abr., 103; 2 Tidd's Prac., 982. This *scire facias*, certainly, does not contain any legal cause of action. Although every word on its face may be true, yet the State is not, by such a statement of facts as it contains, legally entitled to execution. It lacks several material averments other than those above pointed out.

It is not necessary, further, to pursue the subject. The record is defective. It contains none of the form, and but little of the substance, of a record on *scire facias*. A considerable portion of it is a heterogeneous mass of papers and things transcribed, which is not legally any part of the record.

*Per Curiam*.—The judgment is reversed. To be certified, &c.

C. Fletcher, for the plaintiff.

H. Gregg, for the State.

## Taffe v. Warnick.

[\*111]

\*TAFTE v. WARNICK.

FIXTURES.—A carding machine, situated in a building erected for the purpose of carrying on carding,—ready to be put in operation, and standing on the floor in its usual place of operation, but not fastened to the building,—is personal property, and subject to an execution issued by a justice of the peace (a).

## APPEAL from the Clark Circuit Court.

STEVENS, J.—An action of trover for a carding machine. Plea not guilty. a jury trial, and a verdict and judgment for the defendant. The Court, on motion of the defendant, charged the jury, “that if they believed, from the evidence, that the carding machine in question was situated in a building erected for the purpose of carrying on carding, so as to be ready to be put in operation and to do business, although it was in no manner fastened or fixed to the building, except as it stood upon the floor in its usual place of operation, it was not liable to be levied on and sold as personal property, by virtue of an execution issued upon the judgment of a justice.” To which charge the plaintiff excepted.

The only question before us is, whether the instructions of the Court to the jury were correct?

This is a vexed question, and no certain decision or fixed rule on the subject can be found in the books. It is, perhaps, not possible to establish any certain principle, that can be easily applied to every case that may arise. There are many chattels, which though they be of a movable nature, yet, being necessarily attached to the freehold, go along with it in the same path of descent or alienation. These questions, generally, arise between five classes of persons: 1. Between heir and executor; and there the rule obtains with the utmost rigor in favor of the inheritance, and against the right to consider, as a personal chattel, anything which has been affixed to the freehold. 2. Between the executor of the tenant for life, and

(a) See *The State ex rel. v. Bonham et al.*, 18 Ind., 231: *Frederick v. Denol*, 15 Id., 357.

the remainder-man or reversioner; and here the right to fixtures is considered more favorably for the executors. 3. Between vendor and vendee; and between these the rule is as between the heir and executor. 4. Between landlord and tenant; and here the claim to have articles considered [\*112] as personal property, \*is received with the greatest latitude and indulgence. 5. Between debtor and creditor; and here there appears to be no rule fixed. Which of the above rules is to be applied between debtor and creditor, or whether either of them, is a question of much doubt. We, however, incline to think that the rule between landlord and tenant comes nearer to the principle that ought to govern, than either of the others.

Between executor and heir, all manner of fixtures, such as shelves and fixtures in a house, posts, rails, and inclosures, pigeons in a pigeon-house, deer in a park, fish in a pond, machinery of all kinds fixed in a house for carrying on a trade or manufacturing, vats, copper stills, and distilling apparatus, partitions, potash and soap-boilers' kettles, salt pans, &c., go with the freehold. But in modern times, for the encouragement of trade and manufactures, as between landlord and tenant, most of these things are now treated as personal property, which seem, in a very considerable degree, to be attached to the freehold. Thus, things set up by a tenant, in relation to his business or trade, as vats, coppers, tables and partitions belonging to a soap-boiler, chimney-pieces, wainscots, cider-mills and press, buildings resting on blocks and not let into the soil, bark-mills, fire-engines, post windmills, machinery for spinning and carding, though nailed to the floor, copper stills and distillery apparatus, though fixed, are held to be personal property, between landlord and tenant.

If the rule between heir and executor should be applied between debtor and creditor, it would undoubtedly open a door to much fraud and injustice. The creditor of a tenant would be prohibited from executing and selling any of the numerous articles and things first above enumerated, because between heir and executor they are not personal property, but are con-



sidered as part of the landlord's freehold. But the tenant himself, whenever he desired so to do, could take them and dispose of them to his own use, they being personal goods, between landlord and tenant. It has, however, been suggested to divide the rule and make it operate on persons agreeably to their situations. That between the creditor of a tenant and the tenant himself, everything should be considered personal goods, which would be considered personal goods between the tenant and his landlord; but between the creditor of the owner of real estate, and the owner himself, the rule between [\*113] heir \*and executor should be applied. This would be unequal in its operation; one class of men would be subject to one rule of conduct and another class subject to another rule. The machinery, &c., of the manufacturer, tradesman or mechanic, could be seized and sold as personal goods, if he were a tenant, but if he owned the soil it could not.

Upon the most mature and deliberate examination which we have been able to give the subject, and upon a full consideration of all the leading cases to be found in the books, materially relative to the subject, we are of opinion that the same rule should be applied between debtor and creditor that is applied between landlord and tenant. We think that rule more likely to give satisfaction, and answer the ends of justice, generally, than either of the others.

In the case of *Cresson v. Stout*, 17 Johns. Rep., 116, the Court held that machinery for spinning flax and tow, and carding machines, used in a manufactory, which were attached to the building by an upright board resting on the frames and fastened to the ceiling, and by cleats nailed to the floor round the feet of the frames, &c., were personal property and subject to an execution of *fi. fa.* as personal property. In *Poole's Case*, Salk., 368, it was held by the Court, that the vats, tables, partitions, &c., of a soap-boiler were personal goods, and liable to an execution of *fi. fa.* as personal goods.

In the case now before us, we think the carding machine in question was personal goods, and liable to be seized and sold by an execution of *fi. fa.*, issued by a justice of the peace, and

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that the instructions of the Court to the jury were incorrect (1).

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

C. Dewey and J. Howk, for the appellant.

J. H. Thompson and I. Naylor, for the appellee.

(1) The fixtures put up by a tenant, which he has a right, as between himself and his landlord, to remove before his term expires, are considered the tenant's property, and are liable in *England* to a *fi. facias* against him, which, like the execution referred to in the text, only reaches goods and chattels. 2 Stark. Ev., 5th Amer. ed., 909. But if such execution be against a freeholder who himself put up the fixtures, and they are such as would go to his heir, they cannot be taken under it, as appears by the following case:

“Trespass for breaking and entering plaintiff's house, and taking his fixtures, goods and chattels. Justification under a writ of *fi. fa.* directed to the defendant, *Ingilby*, as sheriff of the county, under which the [\*114] defendant, *Hauxwell*, his bailiff, peaceably entered the premises, and seized, &c. Replication *de injuria*, &c. At the trial at the last assizes for *Yorkshire*, before *Cross*, Serjt., the only question was, whether the defendants were justified in seizing, under the execution, some fixtures, consisting of set pots, ovens and ranges. It appeared that the house where these were fixed was built on the plaintiff's own freehold, and the learned sergeant was of opinion that, under these circumstances, they were not seizable by the sheriff under an execution. The plaintiff accordingly had a verdict. And now—

“*Littledale* moved to enter a verdict for the defendants, and referred to *Poole's Case*, 1 Salk., 368; *Elwes v. Maw*, 3 East, 38, and *ex parte Quincy*, 1 Atk., 477.

“*Per Curiam*.—The verdict is right, for these were fixtures which would go to the heir, and not to the executor, and they were not liable to be taken as goods and chattels under an execution. Here, the house where they were fixed was the freehold of the plaintiff, which distinguishes this case from those cited. Rule refused.” *Winn v. Ingilby and Hauxwell*, 5 Barn. & Ald., 625.

“*Fixtures*, if annexed to the freehold for the purposes of agriculture, or otherwise than for trade, or where there is a covenant to leave all improvements, belong to the landlord. But when put up for the purposes of trade, or when what are usually termed *tenant's fixtures*, such as grates, stoves, &c., they are in general removable by the tenant; and even trees in a garden, when used for the purposes of trade, as in nursery grounds, are removable by the tenant; but then he must remove them during his tenancy, or they become the property of the landlord; or, at least, a tenant strictly at will must remove within a more reasonable time; and if a tenant have cove-

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nanted to leave all *improvements*, he cannot then legally remove any *fixtures* that would rank under such general terms; and in case of the sale of a freehold estate, if the vendor do not remove fixtures before he executes the conveyance, they pass to the purchaser. When removable by the tenant, the fixtures put up may be taken and sold under an execution against him. But fixtures put up by a freeholder could not be so taken." 1 Chitt. Gen. Pr., 94.

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MURDOCK v. HOLLAND'S HEIRS.

ERROR to the *Franklin* Circuit Court.

Suit in chancery against an administrator to account, &c. The accounts of the defendant were referred to a master, and the defendant was to give the complainant notice of the time of appearing before the master. No step was taken by the defendant during the next vacation. The Court at a subsequent term, no good reason being given for the defendant's default, rendered a final decree, on bill, answer and proofs, against the defendant. *Held*, that there was no error [\*115] in the \*proceeding. *Held*, also, that mistakes, &c., in the settlement of administrators' accounts in the Probate Court, may be corrected by a court of chancery (1).

*M'Kinney*, J., having been of counsel in the cause, was absent.

*D. J. Caswell*, for the plaintiff.

*D. Wallace*, for the defendants.

(1) *Allen v. Clark*, Vol. 2, of these Rep., 343; *Brackenridge v. Holland*, Id., 377; *Ray et ux. v. Doughty et al.*, 4 Blackf., 115; *The State ex rel., etc., v. Brutch*, 12 Ind., 381.

## DEMAREE and Another v. DRISKILL.

**FRAUDULENT CONVEYANCE.**—*A* being indebted to *B* purchased a tract of land, &c., and, with the fraudulent intent of securing it against *B*'s claim, took the conveyance in the name of *C*, the infant son of *A*. *Held*, that *B*, having obtained a judgment against *A* for the debt, might, by a suit in chancery, subject the land to the payment of the judgment.

**PRACTICE.**—The parties in a suit in chancery submitted the cause on bill, answer, exhibits, and depositions, for a final decree. *Held*, that the filing of a replication was, under these circumstances, waived by the defendant (*a*).

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—A bill in chancery was filed, in the *Decatur* Circuit Court, by *Davis Driskill* against *Peter Demaree* and *Samuel Demaree*.

The bill states, that *Peter Demaree*, for value received, executed a bond to *Driskill* for \$175, dated the 3d of *July*, 1819, and payable the 1st of *March* following; that the obligee obtained a judgment on this bond against the obligor, at the *April* term, 1828, of the *Decatur* Circuit Court, for \$258.39, beside costs; and that, on this judgment, a few days after its rendition, a *fieri facias* issued, and was duly returned “no property found.” The bill further states, that the said *Peter Demaree*, whilst he was so indebted to *Driskill*, to wit: on the 15th of *April*, 1823, purchased a half-quarter section of land situate in *Decatur* County, and paid for the same with his own funds; and that immediately after the purchase, he took possession of the land, has ever since enjoyed the profits, and has made permanent and valuable improvements. The [\*116] bill \*further states, that the said *Peter Demaree*, for the purpose of defrauding the complainant out of his demand, took the deed for the land in the name of his son *Samuel*, then an infant of four or five years of age; that the said *Peter Demaree* is insolvent, and has no property except the land so fraudulently purchased in the name of his infant

(a) *Bunts v. Cole et al.*, 7 Blackf., 265; *Earnhart v. Robertson*, 10 Ind., 8.



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Demaree and Another v. Driskill.

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son; and that the land is, in equity, subject to the complainant's judgment.

The answer of the defendants admits the debt and the purchase of the land. It denies, however, that the purchase was made with the money of the said *Peter Demaree*, one of the defendants; and avers that the money belonged to *Peter Demaree*, jun. It states the land to have been purchased for the sole use of *Samuel Demaree*, in whose name the title was taken, and denies all fraud.

There were a great many depositions taken in the cause, relative to the merits; some on the part of the complainant, and others on the part of the defendants. At the *October* term, 1830, the parties appeared by their counsel, and submitted the cause to the Court for a final decree on bill, answer, exhibits, and depositions. The Circuit Court decreed against the defendants, and declared the land to be liable to the judgment.

The depositions of *David Demaree*, *Benjamin Potter*, *William Dotson* and *Daniel L. Livings*, together with the admissions in the answer, prove to our entire satisfaction all the material allegations in the bill. The land was purchased by *Peter Demaree*, sen., with his own money; and the title was taken by him in the name of his infant son, with the fraudulent intention to secure the property from the debt due to *Driskill*. The beneficial interest in the premises is in *Peter Demaree*, sen., and must be, in equity, subject to the judgment of the complainant.

The defendants contend that as there is no replication filed, the depositions should be suppressed, and the cause decided upon the bill and answer. We cannot accede to this doctrine. The defendants as well as the complainant, have taken depositions relative to the merits of the controversy. The defendants and complainant appeared in court, after the publication of the depositions, and submitted the cause for a final decree, on bill, answer, exhibits, and depositions. The Circuit Court has, on the case thus submitted, rendered its decree. We must consider, under these circumstances, that the formality of a

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[\*117] \*replication was waived by the defendants. The decree of the Circuit Court must be affirmed.

*Per Curiam*.—The decree is affirmed with costs.

*A. Lane* and *G. H. Dunn*, for the plaintiffs.

*W. W. Wick*, for the defendant.

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### THE STATE, on the relation of the Treasurer, *v.* LEAVELL and Others.

PLEADING.—In an action against a sheriff for refusing to collect militia fines, and for not returning the precept requiring him to collect them, it is not a sufficient defense to state generally that the defendant had not time to make the collection before his term of office expired, and that he had delivered the precept to his successor.

SAME.—A plea of performance generally, to a declaration making negative averments in assigning breaches, is not sufficient.

MILITIA FINES.—There was an assessment of militia fines in 1825 against persons conscientiously scrupulous of bearing arms, another in 1826, and another in 1827. *Held*, that these fines could not be collected by means of one list including them all, but that there should be a distinct list for each assessment.

SAME.—The declaration against a sheriff for not collecting a list of such fines should show the name of each person fined, and the amount of his fine; that the fines were recorded in the regimental book separate from other fines, and that the list was signed and sealed by the senior officer of the court of appeals.

### ERROR to the *Henry* Circuit Court.

STEVENS, J.—The material facts contained in the record, necessary for us to notice, are these:

On the 26th day of August, 1826, *Ezekiel Leavell*, *Samuel D. Wells*, *John Dougherty*, *Jesse Forkner*, and *George Handley*, made their bond jointly and severally to the State of *Indiana* for \$5,000, subject to a condition thereunder written, in these words: "That if the above bound and named *Ezekiel Leavell* shall faithfully discharge the duties of his office as sheriff for and within the county of *Henry*, &c., and shall and will keep

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and deliver over according to law, to the proper persons, all sums of money that may come into his hands by virtue of his office as sheriff, as aforesaid, then the above bond to be void," &c.

[\*118] \*On this bond the plaintiff in error brought a suit against the obligors, the defendants in error, and set forth, as a breach of the condition of the bond, the following averments: "That *Ezekiel Leavell* hath not faithfully discharged his duties as sheriff in this, to-wit, that on the 6th day of *September*, 1828, in the said county of *Henry*, *Thomas R. Standford*, then and there being judge advocate of the 48th regiment of the *Indiana* militia, which regiment was then and there composed of the militia within the bounds of said county, did make out and deliver for execution and collection, to the said *Ezekiel Leavell*, then and there being sheriff of the said county, a precept and warrant, the same being a *pluries* list of fines or equivalents, amounting to a large sum, to-wit, \$500 in the whole, and which was assessed against persons conscientiously scrupulous of bearing arms in the said regiment, for the years 1825, 1826, and 1827, by proper courts of assessment for the regiment aforesaid, held according to law for the years aforesaid respectively, which assessments had been duly confirmed by the court of appeals for the said regiment, held according to law, for the years aforesaid respectively, by which said precept and warrant the said *Leavell* was lawfully authorized and required to collect the said list of fines or equivalents therein contained and set forth, and therein stated to have been assessed against persons as conscientiously scrupulous of bearing arms, of the goods and chattels, lands and tenements, of the persons therein named; that yet the said *Leavell* did utterly neglect, fail, and refuse to collect and pay over to the paymaster aforesaid, the said sums of money required to be collected by him, by virtue of the precept and warrant aforesaid, &c., although the persons did at the time, &c., reside in said county of *Henry*, and continued to reside therein for the space of ninety days thereafter, &c.; that the said *Leavell* never levied, collected, or paid the said fines, &c., or any part thereof, as by the said

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precept and warrant he was required; and that he, the said *Leavell*, did not make a return of said list, precept, and warrant, at the return day thereof, nor hath he ever as yet made any return."

To this the obligors pleaded in bar six several pleas: 1st, that there never were any such courts of assessment and appeal, or any such fines assessed, as averred in the declaration; 2d, that no original list of fines issued prior to the issuing of the *pluries* list declared on; 3d, that no such *pluries* list [\*119] of fines \*ever issued, or was ever delivered to the defendant, *Leavell*, as averred in the declaration; 4th, that the list of fines alleged to have been placed in the hands of *Leavell*, never came to his hands until the 6th day of *October*, 1828; that the term of office of the said *Leavell* expired on the 16th day of the same month; that he had not, during that period, time sufficient to collect the money by distress or otherwise; and that on the day his term of office expired as aforesaid, he placed the said list in the hands of his successor to be by him legally executed; 5th, that said *Leavell* did use due diligence to collect the money on said list, from the time the same was put into his hands to collect, until the term of his office expired, to-wit: until the 16th day of *October*, 1828, during which time he did collect and pay over the sum of six dollars, that amount being all he could collect within that time, and therefore he did well and faithfully discharge the duties of his office; 6th, that the said *Leavell* did faithfully discharge the duties of his office, and did faithfully pay over all moneys that ever came into his hands as such sheriff. To the 1st and 3d of these pleas there are issues to the country; to the 2d and 5th, demurrers were filed, and the demurrers sustained by the court; and to the 4th and 6th, demurrers were also filed, but were overruled and final judgment rendered for the defendants thereon.

Several errors have been assigned, and various points raised, for the consideration of the Court, but this opinion will be confined to the last error only. It is sufficient as to the other objections, to say that issues are joined to the country on the



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1st and 3d pleas, and whether these pleas are sufficient or insufficient, is not now a matter before this Court. The 2d and 5th pleas have been demurred to, and the demurrers sustained. Both these pleas are clearly insufficient; neither of them containing a sufficiency of matter to be a legal bar to the action, if the declaration contains a sufficient cause of action. The last point made, and one which requires a more serious examination is, whether the demurrers to the 4th and 6th pleas were correctly overruled or not.

The 4th plea is certainly defective. It does not contain a sufficiency of matter to be a legal bar to the action. A plea in bar must be certain. 1 Chitt. Pl., 513; Comyn's Dig. Pl. It must confess the fact charged, if it set up matter in justification of the defalcation committed or wrong done. 1 [\*120] Chitt. Pl., 497, \*498, 511. And it must be direct and positive, containing facts plainly triable. 1 Chitt. Pl., 518, 520; *Frary v. Dakin*, 7 Johns. Rep., 78. This plea does not confess the fact, that a *pluries* list of fines was ever delivered to the sheriff; it says "the list of fines alleged to have been placed in the hands of *Leavell*;" this does not amount to an admission that the list did positively come into his hands. Again, the plea avers that he had not sufficient time from the time he received the list until he went out of office, to collect the money "by distress or otherwise." This is not a sufficient answer to the charge that "he neglected and refused to collect." It ought to be shown that he used due diligence during that time, and also how much was done towards the collection. As where the condition of a bond was, that the obligor should show a sufficient discharge of an annuity, &c., a plea that he did show a sufficient discharge is bad; he ought to show what kind of a discharge it was. 1 Chitt. Pl., 520; 9 Co., 25; *Martin et al. v. Smith*, 6 East., 561, 562. Again, the plea avers that he delivered the list to his successor in office to be executed. This averment is bad. It is not a sufficient answer to the charge, "that he neglected and refused to return the writ on the return day." It must be shown how much the old sheriff did towards executing the writ, and then an averment

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that he duly made his return on the writ of all he did, and then delivered it, with his return so endorsed thereon, to his successor. *King v. The late Sheriff of Middlesex*, 4 East, 604. 1 Bulst., 70; Dalton, 516; Rol. Abr., 457; 6 Bac. Abr., tit. sheriff, 160, 161; *Richards v. Porter*, 7 Johns. Rep., 137. And if by such return it appears that a levy was made, and that the goods remain on hand unsold for the want of buyers, the old sheriff and not the new one is to complete the execution. 6 Bac. Abr. tit. shff., 161. It is contended by the plaintiff in error, that the plea is also defective in not naming the new sheriff. Whether, if the plea were, in every other particular, good and sufficient in law, that defect standing alone would be a sufficient cause of demurrer, we shall not now decide, inasmuch as there are some doubts about it, and the plea is otherwise defective.

The 6th plea is a plea of general performance. Such pleas may be pleaded to covenants and conditions, where they are all clearly in the affirmative, unless the special averments of the declaration change the character of the defense, by making special negative averments in assigning the breach (1).

[\*121] Every \*plea in bar must be adapted to the nature and form of the action, and be conformable to, and a legal answer to, the whole count. 1 Chitt. Pl., 507, 508; *Skinner v. Rebow*, 2 Str., 919; *Kinder et al. v. Paris*, 2 H. Bl., 561; 2 Saund., 63, d. This plea cannot be a sufficient answer to the special averments in the declaration, to be a legal bar. 1 Chitt. Pl., 316; Comyn's Dig. Pl. c., 61; 4 Day, 313.

It is, however, almost immaterial whether these pleas are good or bad, if the declaration is insufficient. The demurrers go back to the first error.

The 45th section of the militia law provides for and points out the mode of assessing fines on those that bear arms. The 46th section provides, that "it shall be the duty of each regimental judge advocate to make out two fair lists of the names of persons fined in their respective regiments, whose fines have not been remitted by the regimental court of appeals, with the amount of the fine or fines assessed on each individual, which

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said lists shall be certified, signed, and sealed by the commandant of the regiment, and attested by the judge advocate thereof; one of which lists shall be by the judge advocate delivered to the paymaster of the regiment," &c. "The other list shall be delivered to the sheriff of the proper county, where such delinquents may reside; and such sheriff shall be bound to receive the same, and to collect the fines therein specified, under the same law, rules and regulations, as he would if the said list was an execution regularly and legally issued from the Circuit Court, on a regular and legal judgment, against the goods and chattels, lands and tenements, of such delinquents; and further, such list shall not only operate as a *fi. facias*, but shall in each and every stage thereof, legally, fully, completely, and to all intents and purposes, operate as a writ of *fi. fa.*, *vend. exp.*, and *ca. sa.*, as the sheriff may have necessity to use it, during the progress of the collection, and such sheriff shall make return," &c., "in ninety days from the date of the same."

The 47th section provides for the issuing *alias* and *pluries* lists. The 51st section provides for and points out the mode of assessing fines on persons conscientiously scrupulous of bearing arms. And the 52d section provides, that the lists of fines thus assessed by the courts of assessment of fines on persons conscientiously scrupulous of bearing arms, "shall be recorded in the regimental book, separately and apart from [\*122] other fines; and \*it shall be the duty of the judge to make out three fair lists of the fines so assessed as aforesaid, and not remitted by the court of appeals, and the senior officer of the court of appeals shall sign and seal the same, and deliver one list to the paymaster of the proper regiment, and transmit one to the Treasurer of State, and deliver one to the sheriff of the county where such conscientious delinquents may reside; and such list, so signed as aforesaid, shall be a sufficient warrant for the sheriff to proceed and collect such fines, in the same manner and under the same restrictions as is provided for by this act in other cases."

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By these enactments, the assessment of fines when made in pursuance of the act, are, in effect, judicial judgments at law; and the lists thereof, when certified, signed and sealed, as required by the act, have all the force and effect of the several writs of execution issuing from the common law courts, and are in all things to be treated as if they were such writs of execution. It was said in argument that the analogy failed in some respects, and the particular point noticed, was, that those lists have no certain return day. It is apprehended that that was an entire oversight of the counsel: they have a more directly certain return day, if possible, than executions from the circuit courts have. They are returnable in ninety days from their date, which makes a certain and fixed return day to every list, the instant it is dated; but if it has no date, it has no return day, hence it is important and material that each list should have a date.

The assessments being made in effect judicial common law judgments, and the lists of fines writs of execution, it necessarily follows, that in declaring against a sheriff on his official bond, for failing to collect or pay over the money on those lists, or for failing to make return of any such list, all the material averments must be used, that are necessarily used in assigning a breach in an action upon the same bond, for a defalcation in executing and returning a writ of execution. In declaring against the sheriff on his official bond for a defalcation in executing or returning a writ of execution, it is material and necessary to set out the judgment with its date, amount, and parties, and aver that it still remains of record unpaid and in full force. And if the execution on which the defalcation takes place is an *alias* or *pluries*, the issuing and

return of the first writs must appear, to show whether  
[\*123] the returns authorize the \*issue of an *alias* or *pluries*.

1 Chitt. Pl., 354; 2 Chitt. Pl., 190, 191, 192, 193.

In this case, neither the time nor place of holding the courts of assessment, nor the names of the delinquents, nor the amount of the several fines, are stated. Nor is the date of, or the return to, the preceding lists of fines stated.



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The rule of pleading in common and ordinary cases is, that all the necessary facts and circumstances which constitute the cause of action must be set forth regularly, methodically, distinctly, clearly, and certainly, it being an intendment of law that every person will state his own case as favorably for himself as he can. 1 Chitt. Pl., 236, 241, 255. And this rule is enforced with the utmost strictness in assigning breaches upon penal bonds. Nothing is presumed, but everything necessary to the maintenance of the action must be stated with the most particular certainty. 1 Chitt. Pl. 598, 599; 2 Chitt. Pl. 674, 675.

This declaration, if tested by these rules, will, it is presumed, be found wholly insufficient, in many respects other than those above noticed. The averments made show that there were three several distinct assessments of fines; one in the year 1825, one in the year 1826, and one in the year 1827, which are in effect three several and distinct judgments of record, and the list or execution on each must, legally, be distinct and several. Three several and distinct judgments can not be put into the same execution, legally. In this case, however, it appears that all three judgments are put into the same writ. Again, these assessments of fines are not joint against all the persons fined at the same court. Each fine is a separate and distinct assessment against the separate individual found delinquent, and stands as a separate judgment against him and his property, and against no one else. Hence, the declaration ought not only to show the time and place of assessment, but ought also to show the name of each person fined, and the separate amount of the fine.

There is another principle of law which governs these cases, and which is not to be lost sight of. The powers, duties, and jurisdiction of these military boards, in assessing and collecting fines, are summary, and created and given solely by statute, and it is a clear and salutary principle, that such tribunals are confined strictly to the authority given them. They can take nothing by implication, but must show their power expressly given them in every step they take. The statute above

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[\*124] recited \*requires that the fines assessed on persons conscientiously scrupulous of bearing arms, "shall be recorded in the regimental book separately and apart from other fines." The declaration does not show that this was done. Again, the same section of the statute requires that those lists shall be "signed and sealed" by the senior officer of the court of appeals, and it is not shown that this was ever done. These lists have the force and effect of executions, by virtue of the fines being assessed and recorded, as required by statute, and the lists being issued, signed and sealed, as required by statute; and if all these necessary proceedings do not appear, the proceedings have no legal existence, and therefore can give no legal right of action. The words "certain," "lawful," "according to law," "duly," and "sufficient," as used in the averments of the declaration, are of no avail, unless the particular facts themselves were shown. 1 Chitt. Pl., 240.

The declaration and the cause of action, as they appear of record, are both insufficient in law, and no action can be sustained on them, therefore the Court correctly overruled the demurrers to the pleas.

*Per Curiam.*—The judgment is affirmed with costs.

*J. Perry and H. Gregg*, for the State.

*O. H. Smith and J. Rariden*, for the defendants.

(1) Declaration in covenant assigning a particular breach; plea of performance generally, and general demurrer to the plea.

*Per Curiam.*—"This is an action of covenant upon articles of agreement, by which the defendant covenanted to convey to the plaintiff, by a good and sufficient deed, a full unincumbered title to a farm and piece of land therein specified. The plaintiff, in his declaration, assigns, as a breach of the covenant, that the defendant, after the making and execution thereof, and before the giving of the deed, removed from the premises a cider mill, which is averred to have been annexed to the freehold, and making a part of the farm, and so the defendant hath not conveyed to him, the plaintiff, the said farm of land according to the true intent and meaning of the said covenant. The defendant, after craving *oyer* of the agreement, pleads that he did, within the time therein specified, convey to the plaintiff, by a good and sufficient deed, a full unincumbered title to the land in the said articles specified. To which plea there is a general demurrer. This plea is bad. A particular breach having been assigned in the declaration, the plea should have answered it

## Wood v. Mansell and Others.

Whether the covenant to convey the farm would also embrace the cider mill, might depend on circumstances. When the declaration avers that it was annexed to the freehold, and making a part of the farm, the plea should have answered this breach. If the defendant relied on the acceptance of the deed as a fulfillment and discharge of the covenant, he ought to have so pleaded. 'The general plea of performance is not a sufficient answer to the special breach assigned.'" *Bradley v. Osterhoudt*, 13 Johns., 404.

[\*125]

## \*WOOD v. MANSELL and Others.

**TOWN PLAT—EVIDENCE.**—The recorded plat of a town, showing the width of a certain street, was introduced as evidence to prove the width of that street. *Held*, that parol evidence to show that the proprietor of the town intended the street to be of a different width than was shown by the plat, was inadmissible.

**TRESPASS.**—In trespass *quare clausum fregit*, the defendant cannot, under the plea of not guilty, prove that the *locus in quo* was a highway; this defense requiring a special plea.

**SAME.**—A bargainee, except in the case of an adverse possession, may recover in trespass *quare clausum fregit*, by proving property in the *locus in quo*, without showing a previous possession (a).

## ERROR to the Vanderburgh Circuit Court.

**BLACKFORD, J.**—*John B. Mansell, Mary Ann Mansell and Caroline Mansell*, infants, by their next friend, brought an action of trespass against *Luke Wood*. The declaration contains three counts. The first is for entering the plaintiff's close; being a strip of land lying below Main street, in the town of *Evansville*, and between Water street and the *Ohio* river, and fronting the town; and for placing on the premises large quantities of cord-wood. The second count is for entering the close, and expelling the plaintiffs from the same. The third count is for entering the said close, and cutting down and carrying away the trees.

At the *March* term, 1829, the defendant pleaded the general issue, and obtained time to plead further until the 20th of

(a) *Raub et al. v. Heath*, 8 Blackf., 575.

*June* following. On the 20th of *June*, 1829, the defendant pleaded a second plea in bar, to all the counts, as follows: that before the plaintiffs' title accrued, *Hugh M'Gary*, under whom the plaintiffs claim, was seized in fee of the premises, and laid out the town of *Evansville*; that according to the recorded plat, the strip of land described in the declaration, is part of the town; that the town is incorporated; and that the trustees gave the defendant license to occupy the close for a wood-yard. At the *September* term, 1829, the plaintiffs replied, denying the facts contained in the second plea; and the defendant joined issue. At the same term, the defendant filed three other pleas. The third plea is in answer only to the third count. It states that there was a public highway through the close; [\*126] and because the \*trees mentioned in the declaration, obstructed the highway, the defendant cut them down and removed them. The fourth plea, which is only to the first count, says: that in 1817, *Hugh M'Gary*, one of the proprietors of *Evansville*, caused a plat of the town to be recorded; that the *locus in quo* is marked on the plat as Water street, about one hundred feet wide, and is thereby granted to the use of the public and the citizens of the town as a public street, for a wood-yard, and for other commercial purposes; that by virtue of this grant, and by the license of the citizens of *Evansville* and of the president and trustees, the defendant deposited steam-boat wood on the premises, at the place intended by the donor, and designated by the president and trustees for a wood-yard. The fifth plea, which is to all the counts, states the *locus in quo* to have been the property of *Hugh M'Gary*; that he, in 1817, by a plat of the town of *Evansville*, granted the close as public property for the benefit of the town, to be used as a street by the citizens and others trading on the river, and as a public mart on the river; that by virtue of this grant, the defendant entered and deposited steam-boat wood on the close, at the place intended by the donor and designated by the president and trustees, for that purpose. At the *March* term, 1830, the plaintiffs, to the third plea, filed a new assignment; and to the fourth and fifth pleas



## Wood v. Mansell and Others.

they filed replications, denying the material facts in those pleas. The defendant joined issue on the replications to the fourth and fifth pleas. At the *September* term, 1830, the defendant moved for leave to amend his second and fourth pleas, merely because the plaintiffs, by the defendant's consent, had retained the plea from *September* term, 1829, until the next *March* term. This motion was overruled.

The cause was tried at the *September* term, 1830. The following was the plaintiffs' evidence: *Hugh M'Gary* was the original owner of the *locus in quo*, before any of the acts in the declaration or plea set forth. In *November*, 1824, the land was sold by the sheriff on a judgment and execution against *M'Gary*, to *Samuel Mansell*, who afterwards conveyed it to the plaintiffs. The defendant had trespassed upon every part of the premises. The plaintiffs' father had told the defendant that he must not cut any more timber on the land; but the defendant answered that he would, and the trustees of the town would bear him harmless. The defendant had [\*127] confessed that he had cut wood at a place \*which was proved to be on the premises. The width of the ground between the lot below Main street and the river at a medium stage, after allowing one hundred feet for Water street, varied from one hundred and eighty-nine to one hundred and thirty-two feet. The defendant, to support his special pleas of justification, introduced the plat of the town of *Evansville*. Water street is there laid down and stated to be one hundred feet wide. It is bounded on the plat by a line running between the front lots and the river, and parallel with those lots. Below the plat, the proprietors, in repeating the width of the streets, state Water street to be about one hundred feet wide. The width of the ground from the front lots below Main street to the bluff bank of the river, varies from seventy-three to about one hundred and twenty-five feet. But to measure below the bank to the medium stage of water, the distance is as proved by the plaintiffs.

After these facts were proved, the defendant introduced as a witness the person who had drawn the plat, and was one of the

proprietors of the town; but who was not interested in the *locus in quo*. It was proposed to prove by this witness: 1st, that the line drawn parallel to the fronts lots, was drawn by him without any directions from the other proprietors, and without being intended by him to be the bound of Water street; 2dly, that *M'Gary*, when the town was laid out, and up to the execution sale, uniformly said that Water street included all the ground in front of the town to the river; 3dly, that the *locus in quo*, since the laying out of the town in 1817, has been enjoyed by the citizens of the town and by the public, as a street and public highway; and that *M'Gary* never had, from that time, claimed any right to the close, or exercised any acts of ownership over it; 4thly, that the close had been enjoyed by the public as a street and highway, for upwards of twenty years before the commencement of the suit; 5thly, that the witness, under the direction of *M'Gary*, drew the plat in 1817, and that they both intended that Water street, as drawn on the plat, should extend from the front lots below Main street the whole distance to the river, and that the witness considered that the map does so express it. The plaintiffs objected to all this evidence so offered; and the objection was sustained by the Court. The defendant further offered to prove, that the corporation of *Evansville* had given him license, and had required him to enter the close in order to cut out the timber. This evidence was also objected to, and the objection sustained.

[\*128] \*After the examination of the testimony, which has been stated, the defendant moved the Court to instruct the jury, that unless the plaintiffs had proved an entry before the commencement of the suit, by or on behalf of the purchaser at sheriff's sale, or of the plaintiffs under the title of such purchaser; they must find for the defendant. This instruction the Court refused, but said that it was sufficient if constructive possession was proved. The defendant also moved the Court to instruct the jury—that if they believed, from the evidence, that *M'Gary* intended to donate the *locus in quo* to the public, they must find for the defendant. This instruction

was given. But the Court also said, on motion of the plaintiffs, that the intention of *M'Gary* could not be presumed or collected from any other testimony than the record of the original plat made in 1817. After the jury had heard the evidence, as has been set out, they rendered a verdict of guilty against the defendant, and assessed the damages at one dollar. The defendant moved for a new trial, which was overruled, and a judgment was rendered agreeably to the verdict.

This is an action of trespass *quare clausum fregit*. There are five pleas: one, the general issue; the others in justification. To the third plea, there was a new assignment, which was not answered by the defendant. To the other special pleas, there are replications and issues. The case stands, therefore, on the general issue, and upon the issues on the replications to the second, fourth and fifth pleas.

The first objection in the record to the proceedings is, that the defendant was not permitted to amend his second and fourth pleas. This favour was not asked until a year had elapsed from the filing of one of the pleas, and a year and a half from the filing of the other. The ground of the motion was insufficient. The counsel should have kept office copies of his pleas. Besides, his consent to the improper taking away of the pleas after they were filed, divests him of the right to complain of any inconvenience from that cause.

The second objection is, the rejection of the defendant's parol evidence, that the proprietor of the town intended, by the plat, that Water street should, below Main street, extend to the river. The plat had been previously given in evidence by the defendant, and is a part of the record in this cause.

There is a distinct line drawn on the plat, bounding [\*129] Water \*street, and leaving a considerable space between that street and the river below Main street.

Within the space for the street between that line and the lots, which space is much wider than that of the other streets, the widest of which is marked seventy-six feet, there are written the following words—"Water street one hundred feet wide." There is a note at the bottom of the plat, stating Water street

to be about one hundred feet wide. The parol evidence offered was to show, that the line laid down on the plat limiting the width of Water street, was not intended to be the boundary of the street; but that the street was intended to extend in width from one hundred and thirty-two to one hundred and eighty-nine feet further. It appears to us that this parol testimony would be in contradiction of the plat, and was consequently inadmissible. The title of the purchaser of the land outside of the line, under a judgment against the proprietor, purchasing with the plat of the town as his only guide, must be protected from any parol evidence tending to show, in contradiction of the plat, that the line laid down there as the boundary of the street, was not its boundary.

The third objection is, that the defendant was not permitted to prove the use of the *locus in quo* by the public as a highway for twenty years. This evidence was inadmissible under the general issue. 2 Saund., 402, note (1); *Babcock v. Lamb*, 1 Cowen, 238. The second, fourth and fifth pleas, the only ones to which there were issues, only claim the right of way by virtue of the plat of the town of *Evansville*. The defendant's evidence, therefore, to a right of way was restricted by his pleas to the right given by that plat. The evidence offered of an enjoyment for twenty years, if intended to establish a right of way, independently of the plat, was inadmissible as being foreign to the issues. If the object was to show the right to have been granted by the plat, over ground which the face of the plat itself shows was not so granted, it was in contradiction of written evidence, and could not be received.

The fourth objection is on account of the rejection of evidence, tending to show a license to the defendant from the corporation of *Evansville*, to enter the close and cut down the timber. The propriety of this evidence depends on the authority of the corporation to give the license. The corporation pretended to no interest in the close, except what it derived from the recorded plat of the town. That plat, as we have already had occasion to show, gave no property or  
[\*130] right \*to the town in the land lying between the *Ohio*



river and the line bounding the width of Water street, and that land is the *locus in quo*. The consequence is, that the license, if there was one, was made without authority, and the proof of it could not have benefited the defendant.

The fifth objection arises from the refusal of the Court to instruct the jury, that proof of an entry on the premises before the suit, by the purchaser at the sheriff's sale or by the plaintiffs, was essential to a recovery. The *English* law, we believe, does require an entry by a bargainee before he can maintain an action of trespass. In the *United States*, however, this law has been considerably modified. See *Green v. Liler*, 8 Cranch, 229; *Green v. Watkins*, 7 Wheat., 27; *Jackson v. Sellick*, 8 Johns. Rep., 262, 270; *Van Brunt v. Schenck*, 11 Johns. Rep., 377, 385; *Bush v. Bradley*, 4 Day's R., 298. It is our opinion, that unless there appear to have been an adverse possession of the *locus in quo*, the bargainee may recover in trespass by proving property, without showing also a previous possession. The instruction asked for was, therefore, correctly refused.

The sixth objection is on account of an instruction given to the jury, that the intention of the proprietor of *Evansville*, relative to the grant of the *locus in quo*, could not be collected from any other evidence in the cause than the original plat of 1817. The question raised by this objection has already been examined. The instruction given was correct.

The last objection relied on by the defendant below, is, that the Court improperly overruled his motion for a new trial. This objection appears to us as unfounded as the others. The evidence presented by the record shows the verdict to be correct. The plaintiffs proved their case under the general issue; and the defendant failed to maintain his pleas in justification.

*Per Curiam*.—The judgment is affirmed with costs.

*C. Fletcher* and *C. I. Battell*, for the plaintiff.

*S. Hall* and *E. Embree*, for the defendants.

(1) "It seems to be an established rule of pleading, that wherever the defendant in trespass *clausum fregit* justifies the trespass by reason of some title, or easement, which gives him a legal right to do the act which is the subject of the action, he must set forth his title or right to enjoy the easement speci-

## Patterson v. Salmon.

ally, so that the plaintiff may have an opportunity of traversing it; and so it is in replevin. But in trespass for *taking cattle or goods*, it is enough for the defendant to state his *possession only*." Note to *Pearle v. Bridges*, 2 Saund., cited in the text.

[\*131]

## \*PATTERSON v. SALMON.

CONDITION PRECEDENT—PLEADING.—To an action on a bond, the plaintiff's non-performance of a precedent condition therein, or the failure of consideration, may, under the statute, be pleaded in bar (a).

PRACTICE.—Two pleas to the action. Demurrer to the first plea sustained, and final judgment rendered thereon for the plaintiff. *Held*, that the judgment was erroneous, the second plea not being disposed of (b).

## ERROR to the Jackson Circuit Court.

STEVENS, J.—Debt on two writings obligatory made by the plaintiff in error, for the sum of \$100 each, one of which was payable in one year after its date, the other in two years, dated 25th day of *August*, 1827.

The defendant below, after *oyer*, pleaded in bar, that on the day he made the said writings obligatory, he purchased of the plaintiff below, a certain quarter section of land, &c., for the sum of \$320, \$120 of which he paid to the plaintiff at the time, and for the payment of the remaining \$200 he gave the two writings obligatory in question, &c.; that the plaintiff was to make a good deed of conveyance for the land, &c., whenever he should be thereunto requested; that when said deed should be so made, the defendant should execute back to the plaintiff a deed of mortgage on the land, to secure the payment of the \$200; all of which, the plea avers, was reduced to writing and signed and sealed by both parties, &c.; and that after the making said contract and the said writings obligatory, and before the suit was brought, the defendant requested

(a) See cases cited in *Mix v. Ellsworth*, 5 Ind., 517.

(b) *Wright v. The State ex rel.*, etc., 8 Blackf., 385.

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Mosier v. Smith.

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the plaintiff to make him a deed of conveyance, &c., for the land, &c., but that the said plaintiff neglected, failed, and refused so to do, &c. To this plea the plaintiff demurred in law, and the demurrer was sustained and final judgment rendered thereon for the debt, &c. The defendant also pleaded in bar another plea of general and direct payment, concluding to the country, &c.; but judgment was signed over it without taking any notice whatever of it.

The errors complained of are: 1st, The Court erred in sustaining the demurrer to the plea; 2d, The Court erred in rendering final judgment for the debt over a good plea of direct payment, well pleaded and remaining of record [\*132] undisposed of. \*The subject-matter of the plea to which the demurrer is filed, if well pleaded either as a condition precedent or as a failure of consideration, is a good plea in bar, under the statute. The plea, however, as it stands, is defective. It lacks several material averments, and, for that reason, the demurrer was well taken and correctly sustained (1). The general plea of direct payment is a good plea in bar, and the Court erred in rendering judgment over it.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*A. C. Griffith*, for the plaintiff.

*J. Sullivan*, for the defendant.

(1) For the form of a plea of non-performance, by the plaintiff, of a condition precedent, see 3 Chitt. Pl., 6th Am. ed., 989.

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MOSIER v. SMITH.

**DISSEISIN.**—To sustain an action of disseisin the plaintiff must, as in ejectment, show a legal title; and such a title is not conveyed by a land office certificate (a).

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(a) See *Reed v. Hamilton*, 18 Ind., 476; *Diekerson v. Nelson*, 4 Id., 160; *Smith v. Mosier*, 4 Blackf., 51.

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 Phillips and Another v. Nicholas.
 

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ERROR to the *Morgan* Circuit Court.

BLACKFORD, J.—*Smith* brought an action of disseisin against *Mosier*. The declaration avers that the plaintiff below, on the 13th of *October*, 1830, purchased at the land office in *Crawfordsville*, a certain quarter section of land, and received a certificate for the same, signed by the receiver of the land office. It also avers that the defendant, previously to the plaintiff's purchase, had entered into possession of a part of the premises, without any right, and still continued in possession. There is a plea of not guilty, and judgment for the plaintiff.

This judgment must be reversed. The declaration contains no cause of action. To sustain an action of disseisin, the plaintiff is bound, as in ejectment, to show a legal title. A land office certificate conveys no legal title (1). It requires a patent, executed by the president of the *United States*, to convey the legal title for public land.

[\*133] \**Per Curiam*.—The judgment is reversed with costs. To be certified, &c.

*P. Sweetser*, for the plaintiff.

*C. Fletcher* and *H. Gregg*, for the defendant.

(1) *Sed vide Stat.*, 1833, p. 112, *contra*.

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## PHILLIPS and Another v. NICHOLAS.

ERROR to the *Rush* Circuit Court.

The only error complained of in this case was, that the judgment below was for too large an amount. The defendant in error was permitted, upon his application, to enter a remittitur on the record of this court, for the surplus, and then the judgment was affirmed, but without costs in error (1) (a).

*W. W. Wick*, for the plaintiffs.

*O. H. Smith*, for the defendants.

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(a) See *Teagarden v. Helfield*, 11 Ind., 552; 8 Id., 27.



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S. Cassady et al., Administrators, v. Laughlin:

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(1) The Supreme Court of the *United States* permitted a *remittitur* to be entered in a case similar to that in the text. The following is the formal entry:

“Supreme Court of the *United States* of *January* term, in the year of our Lord, 1829. Be it remembered, that on the trial of this cause before the Supreme Court of the *United States*, on a writ of error to the Circuit Court of the *United States* for the district of *Kentucky*, on the 14th day of *February*, in the year aforesaid, it appeared that one of the sixty-eight bills upon which the declaration purported to count severally, to wit: a bill for the amount of fifty dollars, had been omitted in said declaration; the declaration making out a less sum, and one debt less in number, than the writ claimed or the judgment gave. And hereupon the said *John Ashley* and *John Ella, jun.*, defendants in error, by *Daniel J. Caswell*, their attorney and counsel in this court, freely here in court remit to the said president and directors of the bank of the commonwealth of *Kentucky*, plaintiffs in error as aforesaid in this cause, as well the said debt of fifty dollars so omitted as aforesaid, the residue of the debt aforesaid, together with interest on the said fifty dollars at the rate of six per cent. per annum, from the 22d day of *September*, in the year of our Lord, 1825, as also damages *pro tanto*. As witness our hands this 14th day of *February*, in the year of our Lord, 1829. *John Ashley* and *John Ella, jun.*, by *Daniel J. Caswell*, their attorney and counsel in this court.’

“Whereupon it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed without costs, deducting from the said judgment of the said Circuit Court, the amount so deducted as aforesaid.” *Bank of Kentucky v. Ashley et al.*, 2 Peters, 327.

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[\*134] \*S. CASSADY et al., Administrators, v. LAUGHLIN.

DEBT.—Writing obligatory for \$200 to be paid in lumber; the lumber to be such as the payee should require, and to be delivered at a certain time and place, at the lowest cash price. *Held*, that debt would not lie on such an obligation.

ERROR to the *Rush* Circuit Court. This was an action by *Laughlin* against *W. Cassady*. Demurrer to the declaration and judgment for the plaintiff below. After the rendition of the judgment, *W. Cassady* died, and his administrators have sued out this writ of error.

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S. Cassady et al., Administrators, v. Laughlin

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STEVENS, J.—Debt on a writing obligatory, made by the intestate to the defendant in error, for \$200, to be paid in lumber, of such description as the payee might require, to be delivered in *Rushville*, on or before the last day of *September*, 1829, at the lowest cash price.

The declaration avers that on the last day of payment, the payee delivered to the payor, at *Rushville*, the place of payment, a description of the lumber required, and then and there demanded payment, but that the payor neglected and refused to pay the same, or any part thereof. To this declaration the payor demurs in law; alleging for cause of demurrer: 1st, that debt will not lie upon such a writing obligatory, but that the proper action is covenant; and 2d, that the demand was insufficient; that the payee should have given notice of the description of lumber he wished to have, in a due and seasonable time, and that he could not give the notice of his election and demand payment on the same day; that to require of the payor, payment on the same day, was requiring of him an impossibility.

In the decision of this case, we do not think it necessary to examine both causes of demurrer, as the first point made is a decisive objection. Debt is defined in *Bac. Abr.* to be an action founded on an express or implied contract, in which the certainty of the sum or duty appears, and “therefore the plaintiff is to recover the same *in numero*, and not to be repaired in damages by the jury.” *Com. Dig.* says: “debt lies upon every express contract to pay a sum certain.” Blackstone in his commentaries, says: “the legal acceptation of [\*135] debt is, a sum of \*money due by certain and express agreement, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it.” Indeed, the definition given in all the books amounts to the same thing. The plaintiff must recover *in numero* and not in damages.

The three distinguishing points in the action of debt are that the contract must be—1st, for money; 2d, for a sum certain; 3d, specifically recoverable.

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S. Cassady et al., Administrators, v. Laughlin.

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The contract in this case is not for money, but for lumber; and as that is not any certain and specific lumber, being designated only by its price or value, the contract cannot be specifically enforced by a judgment. It applies equally to all lumber of that value, and no specific judgment could be rendered for it. The sum to be recovered sounds in damages, and may be a greater or less sum. That the recovery should be the amount of value for which it ought to have been delivered, is granted, but a greater or less sum might be recovered, for the contract is not to pay the amount in money, but sounds solely in damages for the breach of the contract.

If upon a failure to pay the lumber, the demand became, *instantly*, a liquidated demand for money then being due by specialty, the interest would immediately attach as a legal consequence. But that is not the case here; for interest may or may not be allowed in the discretion of the court and jury who try the issue.

Suppose the defendant below had offered a plea of tender of \$200 in money on the day of payment, would it have barred or answered the action? It would not. The defendant had bound himself to deliver lumber, and the delivery of the specified sum of money named in the contract as the value of the lumber, is not a legal compliance with the contract. The payee might be much more or much less damaged, than the amount of the price or value set upon the lumber by the contract. *Wilson v. Hickson*, 1 Blackf., 230; *Hedges v. Gray*, 1 Blackf., 216; *Campbell v. Weister*, 1 Litt., 30; *Bruner v. Kelsoe*, 1 Bibb, 487; *Watson et al. v. M'Nairy*, 1 Bibb, 356; *Scott v. Conover*, 1 Hals., 222.

*Per Curiam*.—The judgment is reversed with costs. To be certified, &c.

*O. H. Smith*, for the plaintiffs.

*J. Rariden*, for the defendant.

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Tyrrell and Others v. Lockhart.

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[\*136] \*DOE, on the demise of GALLION, v. GRIFFIN.

ERROR to the *Decatur* Circuit Court.

In ejectment, if the declaration be filed, notice given to the defendant, and a copy of the declaration served on him, ten days before the next term, the plaintiff must be ready at that term for trial, unless he can show a good cause of continuance.

*J. Test*, for the plaintiff.

*G. H. Dunn* and *A. Lane*, for the defendant.

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### TYRRELL and Others v. LOCKHART.

**OBSTRUCTING WATER-COURSE.**—Case for obstructing a navigable river to the plaintiff's injury, &c. The declaration averred that on, &c., at the county of *M.* (in which the suit was brought), the defendant built a dam across the east fork of *White* river in said county, the said river being then and there a navigable stream. *Held*, that after verdict, the declaration could not be objected to, for not stating more explicitly that the river was a public highway.

**JURY—PRACTICE.**—A jury, by consent of the parties and the Court, sealed up their verdict in the evening, separated, met again in the morning and gave it in. The verdict being defective, the jury retired by direction of the court, reconsidered it and returned a correct one. *Held*, that this proceeding was not erroneous.

**DAMAGES.**—In an action on tort against several defendants, the assessment of damages must be entire against those who may be found guilty.

**PRACTICE.**—If any of the defendants in such a case are acquitted, and they neglect to ask a judgment for costs, the want of such a judgment does not render the proceedings erroneous.

ERROR to the *Martin* Circuit Court.

**BLACKFORD, J.**—*Lockhart* brought an action of trespass on the case against *Tyrrell*, *S. Tindall*, *G. W. Tindall*, *Dockery*, *Medlock*, *Aldridge*, *Pullum* and *Frèch*.

The declaration charges that the defendants, on the 21st of *December*, 1830, at the county of *Martin*, in this State, built a



## Tyrrell and Others v. Lockhart.

fish dam, of wood and stone, across the east fork of  
[\*137] *White* river, in the said county; *the said east fork of*  
*White river then and there being a navigable stream.*

The declaration states further, that the plaintiff's boat, as he was descending the river with it, struck on the dam, obstructing the free navigation of the river, and continued there for twenty days; during which time *said navigable stream* became frozen over, &c.

The defendants all pleaded not guilty, except *Aldridge*, who made default.

The jury, after hearing the testimony, were directed by the Court, with consent of parties, to seal up their verdict when agreed on, and return it into court on the following morning. The jury retired, sealed up their verdict, dispersed to their respective homes, and gave in their verdict on the next day. By their verdict, they found for the plaintiff \$100 in damages; that *Aldridge, S. Tindall* and *Tyrrell*, were guilty, and should each pay thirty-three dollars and thirty-three and one-third cents; and that the other defendants were not guilty. The Court, on motion of the plaintiff, directed the jury to retire to their room and amend their verdict. The jury accordingly retired, and afterwards returned a verdict by which they found *Aldridge, S. Tindall* and *Tyrrell*, guilty, and the other defendants not guilty; and assessed the plaintiff's damages at \$100. The Court gave judgment for the plaintiff conformably to this last verdict.

The plaintiffs in error make three objections to **these proceedings**:

First, that the declaration does not allege that the stream is a "public highway," nor that the place where the dam was built, was between the points on the river between which the river is declared by the act to be navigable. The act of 1824, relied on by the counsel for the plaintiffs in error, declares that the east fork of *White* river, from the main forks to the main fork above the mouth of *Flat Rock*, shall be considered a public highway. The declaration alleges the river to be a navigable stream, and the dam to be erected across it within the

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Sinks, Administrator, v. English, Assignee.

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county of *Martin*. This, we think, is sufficient, after a verdict. The statute is a public one, and the place laid is between the points described in the act.

The second objection is, that the sealed verdict was conclusive, and could not be altered by the jury. This objection cannot be sustained. The sealed verdict could amount to nothing more than a privy verdict, and was not [\*138] binding on \*the jury. The first verdict, severing the damages as to the defendants found guilty, was erroneous; *Palmer v. Crosby*, November term, 1821; and the Court did right in directing the jury to amend it.

The third objection is, that no judgment was rendered in favour of the defendants who were found not guilty. Those defendants, to be sure, were entitled to a judgment that they should go without day, and recover their costs. They do not appear, however, to have asked for a judgment, and have therefore no reason to complain that it was not rendered.

*Per Curiam*.—The judgment is affirmed with five *per cent.* damages and costs. To be certified, &c.

*E. M. Huntington* and *A. Kinney*, for the plaintiffs.

*J. H. Farnham*, for the defendant.

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### SINKS, Administrator, v. ENGLISH, Assignee.

**WITNESS.**—Covenant against an administrator on an obligation of the intestate, brought by an assignee. Pleas, non-assignment by the obligee, and payment to him by the intestate. *Held*, that the defendant was not a competent witness against the plaintiff, to prove the truth of the pleas.

**ERROR** to the *Marion* Probate Court. In this case *English*, assignee, &c., was the plaintiff, below, and *Sinks*, administrator, &c., the defendant.

**M'KINNEY, J.**—This is an action of covenant, on a writing obligatory, executed by the intestate, *Snow*. It was assigned by the payee to *John West*, and by the latter to *English*, the

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plaintiff. Pleas—1st, non-assignment by the payee to *John West*, and 2d, payment by the maker to the payee. Issues on both pleas to the country, and verdict and judgment in favour of the plaintiff.

By a bill of exceptions, the correctness of the opinion of the Court below, rejecting as a witness, in support of the pleas, the defendant in the action, is presented.

Perhaps no branch of the law has been more benefited by enlightened adjudications, than that of evidence. The distinction between competency and credibility, direct and [\*139] contingent \*interest, is so clearly defined, that the present question, settled by general principle, and particular decision, would not require special attention, were it not that the counsel for the plaintiff, in error has placed it upon the construction of the statute organizing Probate Courts. It would seem proper, however, to advert to some of the rules of evidence, before we seek for the defendant's exemption from their operation, in a construction of the statute.

In 1 Phill. on Ev., p. 56, it is laid down that a party to the suit on record, cannot be a witness for himself or for a joint suitor against the adverse party, on account of the immediate and direct interest which he has in the suit, either from having a certain benefit or loss, or from being liable to costs. The cases of *Haswell v. Bussing*, 10 Johns. R., 128, and *Sharpe v. Thatcher*, 2 Dall., 77, are illustrations of the rule. In Stark. on Ev., 3d vol., 1061, it is said "the rule which excludes a party from giving evidence in his own cause, is not founded merely on the consideration of his interest, but partly at least on a principle of policy for the prevention of perjury." The Circuit Court of the *United States*, in *Willings v. Consequa*, 1 Peters' C. R., 307, speaking of the exclusion of a party to a suit as a witness, says the foundation of the rule is the interest which the party has in the event of the suit, both as to costs and the subject-matter.

As a general rule, then, founded not only on the interest which the party has in the event of the suit, both as to costs and the subject-matter, but on a principle of policy for the

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prevention of perjury, a party to a suit is not a competent witness. The counsel for the plaintiff in error supposes his client to be, as an administrator, without this rule, not liable to costs, and therefore competent. If this were admitted, in relation to costs, the administrator is unquestionably interested in the subject-matter. The defeat of the action leaves in his hands, as assets, the amount that otherwise would be recovered from him. In the proper application of those assets, not only he himself, but his sureties, are deeply interested. The successful support of the pleas in this case prevents a diminution of the estate of which he is the representative. By the principle settled in the case of *Hillhouse v. Smith*, 5 Day's R., 432 (exclusive of his being a party to the suit), that whenever a judgment will certainly affect the fund in which the [\*140] witness is interested he is incompetent, the \*administrator was properly rejected; and by *Fox v. Whitney*, 16 Mass. R., 118, although the estate is insolvent, yet an administrator defendant is not a competent witness. In the case of *Heckert et al., adm'rs, v. Haine*, 6 Binn. R., 16, one of the defendants was offered as a witness in support of the defense; exclusive of the question of costs, he was rejected. See, also, *Vansant v. Boileau et al.*, 1 Binn. R., 444.

Without dwelling upon other cases, that support the opinion of the Probate Court, it may only be necessary to remark that the case of *Carter v. Pearce, adm'x*, 1 T. R., 163, and others cited by the counsel for the plaintiff in error, do not appear to sustain his positions, or to conflict with this opinion. We are also satisfied that it is supported by a proper construction of the statute referred to.

*Per Curiam*.—The judgment is affirmed with costs.

*H. Brown*, for the plaintiff.

*J. H. Scott*, for the defendant.



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Rousan v. Moffett and Others.

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## [\*141] \*ROUSAN v. MOFFETT and Others.

AWARD—APPEAL.—A defendant appealing from the judgment of a justice of the peace on an award, cannot have the cause tried by a jury in the Circuit Court, unless the award be first set aside for fraud, corruption, or other undue means.

ERROR to the *Union* Circuit Court.

STEVENS, J.—Appeal to the Circuit Court from the judgment of a justice of the peace, founded on an award of arbitrators.

It appears of record, by an agreement, that a written covenant was made between the defendants of the one part, and the plaintiff of the other part, that the defendants should cut, score, and hew, a set of barn logs for the plaintiff, and that the plaintiff should pay them a certain price for the same. The plaintiff brought suit on the written covenant, for fifty dollars, against the defendants, before a justice of the peace; but before the trial was had, the parties came before the justice and agreed to arbitrate the matter in controversy, by a submission to three disinterested persons, by them mutually chosen, under the provisions of the 15th and 16th sections of the act regulating the jurisdiction of justices of the peace, approved the 30th day of *January*, 1824; and the arbitrators, among other things, rendered a final award in favour of the plaintiff, for one cent in damages, &c., and the justice entered judgment accordingly.

Afterwards, *Moffett*, one of the defendants, appealed to the Circuit Court, and the case was heard by a jury, and a verdict rendered, in favour of the defendants, for nine dollars and sixty-two and a-half cents. On the bringing in of the verdict, the plaintiff moved the Court in arrest of judgment on the verdict, and, also, to render judgment on the award of the arbitrators, inasmuch as there was no evidence shown to the Court, that the award was obtained by fraud, corruption, or other undue means; which motion was overruled, and judgment rendered on the verdict of the jury.

[\*142] It further appears of record, that the defendants filed no written

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defense, nor did the plaintiff file anything except the written covenant above stated.

The first question is, did the Court err in overruling the motion in arrest of judgment, on the verdict of the jury, for the sum of nine dollars and sixty-two and a-half cents damages, &c. We think no question or issue can legally arise or be heard before the Court, until it is determined whether the award was obtained by "fraud, corruption, or other undue means," as required by statute; and that is a matter for the Court to determine, and not a jury. No waiver of the award can be presumed, unless something appeared of record, authorizing that presumption. The jury were improperly impaneled, and judgment on their verdict ought to have been arrested (1).

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*O. H. Smith*, for the plaintiff.

*J. Rariden*, for the defendants.

(1) See Rev. Code, 1831, pp. 304,305. As to the grounds of setting aside an award returned in the first instance to the Circuit Court, see *Hamilton v. Wort*, ante, p. 68.

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### H. FITCH v. DUNN, Marshal, &c.

**REPLEVIN.**—If goods, seized by the marshal of an incorporated town, by virtue of a legal precept, be unlawfully taken out of his possession, he can support an action of replevin for them against the wrong-doer.

**PRACTICE.**—The defendant in replevin pleaded three pleas in bar: a replication to one of them was demurred to, and the demurrer overruled. *Held*, that, whilst the other pleas were undisposed of, the plaintiff could not have final judgment (a).

**ERROR** to the *Dearborn* Circuit Court.

**BLACKFORD, J.**—This was an action of replevin by *Dunn*, marshal of the town of *Lawrenceburgh*, against *Fitch*, for taking

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(a) *Wright v. The State, ex. rel., etc.*, 8 Blackf., 385.

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H Fitch v. Dunn, Marshal, &c.

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an ox-cart, &c. The defendant pleaded three pleas in bar: 1st, the general issue of *non cepit*; 2d, property in himself and C. Fitch; 3d, that the plaintiff was not marshal, &c.

[\*143] \*To the 2d plea, the plaintiff replied specially as follows: that the president, &c., of *Lawrenceburg*, having authority, &c., caused to be issued a duplicate of an assessment of the lots, &c., together with the amount of taxes assessed, &c.; and also caused to be issued a warrant, &c., directed to the plaintiff as marshal of the town, commanding him to collect the taxes, &c.; that, on, &c., the plaintiff was marshal of the town, &c.; that the defendant and C. Fitch stood charged, &c.; and that the plaintiff, by virtue of the duplicate, &c., took the cart to satisfy the taxes, &c. A general demurrer was filed to this replication. The Circuit Court overruled the demurrer, and rendered a final judgment against the defendant for nominal damages and the costs of suit.

The plaintiff in error has not pointed out any particular objection to the replication demurred to. It appears to us to be good. The marshal in this case, like a sheriff who has taken goods on execution, has a sufficient property to maintain the action of replevin. But the overruling of the demurrer to this replication to the second plea, did not settle the case against the defendant. It only disposed of the second plea. There were two other pleas in bar filed by the defendant. It was necessary that they also should be disposed of, before the plaintiff could have final judgment. The final judgment, in this case, is therefore erroneous, and must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

D. J. Caswell, for the plaintiff.

G. H. Dunn, for the defendant

## COX and Others v. WAY, Commissioner.

**READING—PERFORMANCE.**—Debt on bond conditioned for the performance of certain work within a limited time. *Held*, that a plea of readiness to do the work, and of the plaintiff's refusal to permit its performance, should show that the refusal, &c., was before the expiration of the time for doing the work.

*Held*, also, that a plea in such case, of an agreement to prolong the time and of performance, &c., should show that the work was, within the enlarged time, performed and accepted in discharge of the bond.

[\*144] **\*WITNESS.**—In an action by a road commissioner on a bond, his predecessor to whom the bond was given, not being interested, is a competent witness for the plaintiff.

**DAMAGES—EVIDENCE IN MITIGATION.**—On a writ of inquiry of damages, in a case of breach of contract as to the performance of certain work, the defendant may, in mitigation of damages, prove that a part of the work had been done, under the contract, to the plaintiff's benefit (a).

ERROR to the *Randolph* Circuit Court.

BLACKFORD, J.—This was an action of debt by *John Way*, road commissioner, &c., against *John D. Cox*, *Samuel Cox*, *James Bass* and *George Hoffman*, founded on a penal bond, dated the 6th of *September*, 1828, and conditioned for the performance of certain work on a State road, within two months from the date of the bond. The condition of the bond, the breach of non-performance, and special damages, are set out in the declaration.

The defendants pleaded two pleas in bar: 1st, that they were always ready to do the work; that after they had commenced, the plaintiff refused to pay them pursuant to the contract; and that he refused to permit them to perform the work; 2d, that after the execution of the bond, the plaintiff agreed with *Hoffman*, one of the defendants, to prolong the time for doing the work till *February*, 1830; and that *Hoffman*, pursuant to the last-mentioned contract, did certain work described in the plea, which was accepted by the plaintiff as done

(a) *Ewing v. Coddington*, 5 Blackf., 433.



pursuant to said contract. To these pleas the plaintiff demurred generally; and the Court sustained the demurrer.

On the execution of the writ of inquiry, the plaintiff offered to prove, by his predecessor in office, who was the obligee in the bond, that the road commissioners had spent several days in consequence of the defendants' breach of contract, for which they had been paid out of the road fund; and further, that the plaintiff had advanced to the defendants nineteen dollars, in part for the work which they had undertaken to perform. The witness was objected to as incompetent, and the objection overruled. The evidence proposed to be given by him was also objected to; and this objection was also overruled. The defendants offered to prove, in mitigation of damages, that at the expiration of the time within which the work was to be done, they had performed more than one-third of the labor contracted for; and had afterwards completed the same, under the plaintiff's direction, for less than the price first agreed upon.

This evidence was rejected.

[\*145] \*The jury assessed the damages at thirty-two dollars and thirty cents, and the Court rendered judgment accordingly.

The first plea does not show that the defendants were, by the contract, entitled to be paid as stated, before the completion of the work. Neither does it show that they had commenced the work, or that the plaintiff had hindered them from proceeding in it, before the expiration of the time within which it was to be performed. The demurrer to that plea was, therefore, correctly sustained.

The second plea does not show that the work described in the condition of the bond, had been performed within the enlarged time, in discharge of the bond on which the suit was brought. It is for that reason defective.

The witness, who was objected to as incompetent, not being interested, was admissible; and the evidence of the special damage, alleged in the declaration, was unobjectionable. But the testimony offered by the defendants on the writ of inquiry, should not have been rejected. It tended to show that the

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plaintiff had derived some benefit from the labor, which had been performed in pursuance of the first contract, and the jury might, in the assessment of damages, take that into consideration. It is proper, therefore, that there should be another inquest of damages (1).

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Rariden*, for the plaintiffs.

*J. Perry*, for the defendant.

(1) There was a petition for a re-hearing in this case. but it was overruled. Post, p. 328.

## M'CosKEY and Another v. DEMING.

WRITTEN PROMISE—EVIDENCE.—*A* promised in writing, on the back of a promissory note held by *B*, to pay him the amount of the note if not collected from the maker; but the consideration of the promise was not specified in the written promise. *Held*, that in a suit by *B* against *A* on the promise, the writing signed by *A* was legal evidence; but, *quære*, whether it was sufficient of itself to support the action.

[\*146] \*ERROR to the *Vigo* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit by *Deming* against *M'Coskey* and *Lane*. Plea, the general issue. Verdict and judgment for the plaintiff below.

The cause of action was as follows: On the 18th of *April*, 1827, *Robert Neil*, by his writing obligatory, for value received promised to pay *Isaac Lambert* or bearer \$540, on or before the 15th of *November* following. *Deming*, the plaintiff below, became possessed by delivery of this writing obligatory, before it was due. On the 15th of *May*, 1827, the defendants, *M'Coskey* and *Lane*, by their endorsement on the writing obligatory, acknowledged themselves responsible for the face of the obligation, if not collected from *Neil*. On the trial of the

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cause the plaintiff offered the acknowledgment, with the obligation on which it was endorsed, in evidence. The testimony was objected to, and the objection overruled. The admission of this evidence is the only error assigned.

The decision of the Circuit Court, complained of by the plaintiffs in error, amounted to nothing more than that the written acknowledgment was legal evidence in the action. The effect of that evidence, or how far it would go to establish the right of the plaintiff below to recover, was not made a question in the Circuit Court, and does not appear to have been there decided: of course, it is not before us for decision. Whether, where no new consideration passes between the newly contracting parties, the consideration for the promise to pay the debt of another should be in writing, as well as the promise itself, is a question upon which the decisions are contradictory, and respecting which we give no opinion (1). We merely determine, as the Circuit Court did, that the written acknowledgment under consideration was admissible as evidence, without saying what other evidence, if any, was essential to sustain the cause.

*Per Curiam*.—The judgment is affirmed with costs.

*T. C. Cone*, for the plaintiffs.

*J. Farington*, for the defendant.

(1) The *English* statute is 29 Car. 2, c. 3. For the *Indiana* statute, see R. C. 1831, p. 269. It has been held that, under the *English* statute, to charge the defendant on a promise to pay the debt of a third person, the consideration of the promise, as well as the promise itself, must be in writing. The leading case for this doctrine is *Wain v. Warlters*, 5 East., 10. That case, though occasionally questioned in *England*, continues to be there [\*147] adhered to. 2 Stark. Ev. \*2d Eng. ed., 349. Some of the decisions in the *United States* follow the case of *Wain v. Warlters*, and some oppose it. See note (1) to Stark. Ev. supra, 5th Am. ed.

"But any person may bind himself by an express parol promise, founded upon a new consideration, to pay the amount of another person's debt. As where *A* having a lien upon policies of insurance in his hands, delivers them up to an agent of the owner, on an agreement that the defendant, the agent, will pay the amount of a bill drawn by his principal, and accepted by *A* for the accommodation of the principal. The principle of this and similar cases seems to be very clear. *A* had a right to retain the policies, and if the de-

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defendant had personally undertaken to pay him a sum of money in consideration of his giving up the policies, the doing so, being a relinquishment of an advantage by the plaintiff, would have been a good consideration to enforce the payment of the money; but if the relinquishment would have been a good consideration to support a promise to pay money, why should it not be equally sufficient to support any other promise? If a promise by the defendant to pay twenty pounds (the amount of the bill) would have been binding, why should not the promise to pay the amount of the bill specifically, be also binding? So, where the plaintiff had a lien on goods for a debt due from *A* *B*, and the defendant, in consideration that the plaintiff would relinquish his lien, promised to pay the debt, it was held that the case was not within the statute. So, where the plaintiff distrained for rent, and the defendant, an auctioneer, being in possession of the goods, and about to sell them for the benefit of the creditors, by virtue of a bill of sale made by the tenant, promised to pay the debt. *Williams v. Leper*, 3 Burr., 1886; 2 Wils., 308; *Casting v. Aubert*, 2 East., 325, 330; *Bampton v. Paulin*, 4 Bing., 264;” *Stark. Ev. supra*, 346; See the *American* cases on this subject. *Ib.*, note.<sup>2</sup>

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HOLCROFT and Others v. HUNTER.

**MORTGAGE—RIGHT TO REDEEM.**—*A* was *B*'s surety for a debt due to *C*. To secure *A* as to his suretyship, *B* assigned to him a land office certificate, taking from him a bond for a re-conveyance, on re-payment, &c. *A* paid the debt to *C*, and, afterwards, sold and transferred the certificate to *D*, who had notice of *B*'s equity. Held, that *B* had a right, in equity, to redeem, &c. (*a*).

**ERROR** to the *Harrison* Circuit Court. *David Hunter* was the complainant in the Circuit Court, and *Nathaniel Holcroft*, *Ephraim W. Bentley*, and *Ezekiel W. Bentley* were the defendants.

**M'KINNEY, J.**—This is a suit in chancery to enjoin a judgment at law, and obtain a re-conveyance of land.  
 [\*148] The complainant \*states, in substance, that in the year —, he was indebted to *John Holcroft*, in *Pennsylvania*, and that the defendant, *Nathaniel Holcroft*, became his

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(a) See *Bell et al. v. Longworth et al.*, 6 Ind., 273; *St. John et al. v. Freeman*, 1 Id., 84.



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surety; that in the year 1817, about descending the *Ohio* river on a trading voyage, the defendant, *Nathaniel Holcroft*, proposed, as he was in debt and his return uncertain, he should secure him against the debt due to *John Holcroft*; that the complainant, to effect this, assigned to him a land certificate worth \$500 or \$600, it being for the southeast quarter of section twenty-three, township five, range four east, in the Jefferson land district, and received from him a bond, dated 17th *April*, 1817, conditioned, "that if *Nathaniel Holcroft* shall transfer to *David Hunter* (complainant), the above described certificate, and also pay the full amount to the *United States*, due upon said quarter of land, upon said *David Hunter* paying said *Nathaniel Holcroft* \$270 on or before the 1st *July*, 1818, with lawful interest from date, then the obligation to be void." He charges that the defendant, *Nathaniel Holcroft*, surrendered the said certificate to the land office, and received a certificate of further credit; that he paid *John Holcroft* fifty dollars, and has since paid, at different times, upwards of \$100 on the note executed by the defendant, *Nathaniel*, and himself, to said *John Holcroft*; that he left the defendant's bond, when he went down the river, in the hands of *James W. Gaither*, his brother-in-law, with the request that he would advance the money due to *John Holcroft*, and save the land; that during his absence, *Gaither* called on the defendant, *Nathaniel*, and informed him he had a sum of money sufficient to discharge all demands he had against the complainant; that the defendant, *Nathaniel*, refused to receive the money, and assign the certificate to said *Gaither* and one *Marshal Hunter*, or to *Patrick Hunter*, complainant's father. The bill states that the defendant, *Nathaniel*, assured the complainant that if he assigned the certificate to him, he would not interrupt *Patrick Hunter*, complainant's father, then in the peaceable possession of the land; that he was acting for complainant's father, and in the event of accident to complainant during his absence, he might secure the land to his father; that complainant, subsequently confiding in the friendship and integrity of the defendant, about descending the *Ohio* river, at the defendant's request left, with the wife of the defend-

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ant, the bond above described; that the defendant, *Nathaniel*, afterwards sold said land to the defendants, *Ephraim* [\*149] *W. \*Bentley* and *Ezekiel W. Bentley*, both of whom are charged to have been apprized of the above facts; that the purchasers of the land, the defendants, *Bentleys*, have since instituted an action of disseisin, in the *Harrison Circuit Court*, against *Patrick Hunter*, complainant's father, the tenant in possession, for the recovery of said land; that complainant was permitted to be made defendant thereto, and that at the present term of said Circuit Court, the said defendants recovered judgment against them, and will eject them from the same, unless restrained, &c.; that the complainant is not, except as above, indebted to the said *Nathaniel*; and that he has paid large sums of money in defending the action of disseisin.

Prayer that the injunction granted be made perpetual, the defendants be decreed to re-convey to him the said land, and refund the costs he has paid in the action of disseisin, &c.

The defendant, *Holcroft*, by his answer, admits the assignment of the certificate as charged, his having surrendered it and received a certificate of further credit, and the execution of the bond, at the time charged in the bill. He states that the real consideration was his liability as the complainant's surety, on a note to *John Holcroft*, dated 30th of *March*, 1816, for \$303.83; that the complainant paid on the note fifty dollars, which was endorsed; that he afterwards paid the note, and that the complainant has since made the following payments: 25th *December*, 1819, thirty dollars; 1st *September*, 1821, thirty-five dollars; 7th *April*, 1824, sixteen dollars; 17th *September*, 1824, twenty-four dollars; which are all the payments made by the complainant. He admits *Gaither's* having called on him in 1818 or 1819, and having informed him that he had his bond to the complainant, and that he had a sum of money, but that *Gaither* did not show the bond, or tender the money unconditionally; that *Gaither* offered to pay him whatever was due from the complainant, if he would assign to him and *Marshal Hunter* the certificate for the land,

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which he declined doing; *Gaither* not pretending that the land belonged to him and *Marshal Hunter*. He says the complainant left the bond with him in *July*, 1820, with the understanding that he was to do with the land what he thought proper and right, and admits a trust in honor to account for any surplus, after paying the debt. He, also, admits he sold the land to the other defendants for \$300, but says that he would, prior to said sale, have transferred to the complainant [\*150] \*or his order, the certificate, upon payment of the debt, and was at all times ready to do so. He admits the action of disseisin, and the judgment in the same.

The defendants, *Ephraim W. and Ezekiel W. Bentley*, by plea and answer, say, that on the 30th *March*, 1825, they purchased the land described in the bill, for a full and valuable consideration, viz., \$300; and on the day of the purchase, received an assignment from the defendant, *Holcroft*, of the certificate of entry, without notice of the equity pretended in the complainant's bill. By their answer, they deny knowledge or notice of the complainant's claim, until after the purchase.

The cause was submitted to the Circuit Court, on bill, answers, exhibits and depositions. That court decreed, that the defendants, *Ezekiel W. Bentley* and *Ephraim W. Bentley*, should re-assign the certificate for the land, described in the bill, to the complainant; that the note executed by the complainant, as principal, and *Nathaniel Holcroft*, surety, should be delivered up to the complainant, a copy thereof being left on file; that the injunction be made perpetual, and that the complainant pay the costs of this suit, and the costs in the action of disseisin.

From the case presented, it appears that the complainant, to indemnify his surety, assigned to him a certificate for a quarter section of land, upon which the father of the complainant resided; that this was the inducement to the assignment, is shown by the bill, admissions and proofs. If such be the fact, parol testimony would be admissible to show the true nature of the transaction, and to restrain the transfer to its proper use. *Day v. Dunham*, 2 Johns Ch. R., 189; *Strong v.*

*Stewart*, 4 Ib., 167; *James v. Johnson*, 6 Ib., 417; *Henry v. Davis*, 7 Ib., 40.

The assignment is not, however, dependent upon this class of testimony. A bond, executed by the assignee on the day of the assignment, discloses the intentions of the parties, and the object of the transfer. By the condition of the bond, the certificate was to be re-assigned to the complainant on the payment of a specific sum of money, and the defendant, *Holcroft*, in his answer, states that that sum was the amount of his liability as complainant's surety. The execution of the bond would, therefore, agreeably to a course of decisions, clothe the assignment with the incidents of a mortgage, and enable the redemption of the land by the assignor, unless opposed by the interests of innocent purchasers. *Manlove v. Bail*, 2 Vern., 84; 1 Madd., 517.

[\*151] Although the assignment was thus originally intended as a security in the nature of a mortgage, and must be so viewed, the re-delivery of the bond to the obligor, unless explained, would indicate an abandonment of the right to redeem, on the part of the complainant. This idea of abandonment is however repelled, not only by the testimony, but by the admissions of the defendant, *Holcroft*, in his answer. He admits the bond to have been re-delivered in *July*, 1820, and his view of the effect of the re-delivery does not conflict with that of the complainant, since after possession of the bond was obtained, he acknowledges payments to have been made by the complainant on the note, during the succeeding years, up to *September*, 1824. It would be repugnant to every principle of justice, whatever were the circumstances by which the defendant, *Holcroft*, obtained possession of the bond, that he should be permitted to regard the assignment as an absolute sale, discharging the amount due on the note, and at the same time treat the debt as subsisting, to pay which the assignment was made. He could not be entitled to both the land and the debt. He is concluded by his election, to treat the land as subject to be redeemed. As a security in the nature of a mortgage, the interest of the complainant could only be



divested by his own act, or by the judgment of a competent tribunal. Neither of these having occurred, the right to redeem continues, unless opposed by a sale to innocent purchasers.

It is then material to inquire if the defendants, *Ezekiel W. Bentley* and *Ephraim W. Bentley*, who purchased in 1825 of the defendant, *Holcroft*, are such purchasers. If they are, they are protected. They allege, by plea and answer, that the purchase was made for a full and valuable consideration, and deny notice of the equity charged in the bill, until after the purchase. This denial is not sufficient. They cease to be protected and regarded as innocent purchasers, if after the purchase, but before payment of the purchase-money, they received notice. *Harrison v. Southcote*, 1 Atk. Rep., 538; *Story v. Ld. Windsor*, 2 Ib., 630; *Frost v. Beekman*, 1 Johns. Ch. Rep., 288, 301; *Murray v. Finster*, 2 Ib., 155; *Jewett v. Palmer*, 7 Ib., 65. They do not state that the purchase-money has ever been paid, nor can we infer that fact from the statement, that the purchase was made for a full and valuable consideration. The payment of the purchase-money [\*152] is not necessarily simultaneous \*with the purchase.

If the payment was to be made at a future day, and notice of an existing equity be received before such payment, the vendee would be justified in withholding payment until the settlement of the conflicting equity. Tested by this principle, the defense of the *Bentleys* is obviously insufficient.

Exclusive, however, of the objection to the plea and answer of the purchasers, the testimony of two of the witnesses, *Cook* and *Duggins*, establishes the fact that the defendants had by their own admission actual notice of the complainant's equity, and that the purchase was made with a willingness for a struggle. One of the witnesses states *Ezekiel W. Bentley's* admission of the complainant's equity, in general terms, without fixing it either before or after the purchase. The other is more definite, and gives his admission of a knowledge of the equity charged, prior to the purchase. If notice was thus possessed, the purchase and payments, if made, were in their own wrong. The law recognizes a notice to be either actual or

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legal. From the whole case it is apparent that the complainant, by his tenant, *Patrick Hunter*, was in uninterrupted possession of the land, from the assignment of the certificate to the institution of the action of disseisin. In the case of *Lessee of Billington v. Welsh*, 5 Binn., 129; *Tilghman*, C. J., speaking of notices, actual and legal, says: "These legal notices, being sometimes contrary to the fact, are confined to cases in which violent presumption of actual notice arises. The undisturbed possession of land has generally been considered as legal notice; because the fact of possession being notorious, it is sufficient to put the purchaser on his guard, and to induce him to inquire into the title of the possessor. But to entitle the bare possession to such weight, it ought to be a clear, unequivocal possession." In this case, the purchasers obtain, not a legal title, from one in possession of the land, but an inchoate and imperfect title, from one without possession. Ordinary diligence would surely have prompted inquiry, and inquiry must have resulted in information of the complainant's equity. The defendants, then, having both actual and legal notice of the complainant's equity, cannot claim protection. The interest of the complainant in the land is, therefore, unaffected by the sale made by the defendant, *Holcroft*, to the other defendants.

Upon tendering the amount due to the defendant, *Holcroft*, he having paid the note to *John Holcroft*, the complainant is \*entitled to a decree for the land. This he has done, having tendered and left in court \$360.81½, the amount agreed upon by the parties, as the principal and interest due on the note to *John Holcroft*.

We are therefore of opinion, that the decree of the Circuit Court be affirmed, except so far as relates to the costs below in this suit, and the costs in the action of disseisin, and that those costs be paid equally by the defendant, *Holcroft*, and the defendants, *Ezekiel W. Bentley* and *Ephraim W. Bentley*.

*Per Curiam*.—The decree is affirmed, except, &c., with costs.

*C. Dewey* and *I. Howk*, for the plaintiffs.

*J. H. Thompson*, for the defendant.

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 Johnson and Another, Assignees, v. Baird.
 

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 JOHNSON and Another, Assignees, v. BAIRD.
 

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CONTRACT—TENDER.—To an action on a note for the payment of a certain sum, at a certain time and place, in hats, it is a good defense, that the defendant was ready to deliver the hats at the time and place appointed, was always ready, and is still ready, to deliver them at the place on demand (a).

ERROR to the *Washington* Circuit Court.

BLACKFORD, J.—*J. & J. Johnson*, assignees of *Farnham*, commenced an action against *Baird*, before a justice of the peace, on a note in the following words: "One day after date, for value received, I promise to pay *Jno. H. Farnham, Esq.*, fourteen dollars, in fine hats, at my house in *Salem*. *March 3d, 1830. William Baird.*" The payee endorsed the note on the 28th of *April, 1831*, to the plaintiffs.

Two pleas were filed to the action. Verdict and judgment in the justice's court for the defendant. The plaintiffs appealed to the Circuit Court. The note and the pleas were sent up to the Court, by the justice, with the transcript from his docket. The first plea is in these words: The defendant comes and for plea says, that on the day the said note was due, to wit, on the 4th day of *March, 1830*, he was ready to pay the said *John H. Farnham*, fourteen dollars, in fine hats, at his, the said defendant's, house in *Salem*, according to the [\*154] terms and meaning \*of said note; and that the said *John H. Farnham* did not attend at any time during said day, at said place, to receive the same; that he hath ever since been ready, and still is ready, to pay and deliver said hats on demand. The second plea is, that *Farnham* never at any time previously to his assigning said note to the plaintiffs, demanded of the defendant said hats, nor have the plaintiffs demanded the same at any time since the assignment. The clerk states that the plaintiffs demurred to these pleas; that the

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(a) See *Blake v. Hedges*, 14 Ind., 566; *Bailey v. Ricketts et al.*, 4 Ind., 488; *M'Kernon v. M'Cormick*, 2 Ind., 318; 1 Ind., 224, 254; 5 Blackf., 298.

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demurrer to the first plea was overruled; and the demurrer to the second sustained. The record, however, contains no demurrers, and the case must stand as if none were filed. The clerk also states that the issue being made up, thereupon a jury came, &c. The record shows no replications in the cause; but as the suit originated in a justice's court, we must presume that there was a general denial of the pleas.

On the trial, the plaintiffs moved the Court to instruct the jury—1st, that if they believed from the evidence, that before the assignment of the note, the assignor of the plaintiffs, or his agent, demanded a fine hat at the dwelling-house of the defendant, and could not obtain it, and that no fine hats were offered him, such a demand and refusal are sufficient to disprove the plea of the defendant; 2d, that if the jury believed from the evidence, that the defendant had hats at his house, but had never set them apart for the plaintiffs, nor their assignor, and had none set apart when the agent of said assignor demanded them, they must find for the plaintiffs. These instructions were refused. The jury found a verdict for the defendant, and there was judgment accordingly.

The only question presented by this record is, whether the instructions asked for ought to have been given? It is said that if the hats were demanded at the place and could not be obtained, and that none were set apart at the time of demand, the plaintiff must recover. In answer to this, it is only necessary to remark, that the demand might have been made, for anything shown to the contrary, before the note was due. It is further contended, that the defendant must not only have had hats at the place, but that he was bound to set them apart for the plaintiffs. We are of opinion that it is not essential to the defense in the case, that the hats should have been actually set apart for the plaintiffs. The defendant might have done

so, to be sure, and have thus released himself from the [\*155] contract; \*but he was not obliged to do it in order to avoid an action. If he was ready to deliver the property at the time and place agreed on, was always ready, to deliver it at the place on demand, he cannot be said to have



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Rogers v. Lamb.

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broken his contract, and until there is a breach of the contract, the plaintiffs ought not to recover (1).

There were certain instructions given to the jury, to which the plaintiffs object. But as no objection was made below to these instructions, we have no authority to examine them.

*Per Curiam*.—The judgment is affirmed with costs.

*J. H. Farnham*, for the plaintiffs.

*I. Howk*, for the defendant.

(1) A petition for a re-hearing, filed in this cause by the plaintiffs, was overruled. Post, *May term*, 1833.

“In all suits based on any note, bill of exchange, or other obligation, payable at a particular place, it shall not be necessary for the plaintiff to aver in his declaration, or prove on the trial, a demand of payment at such place. But it shall be lawful for the defendant, in any such suit, to aver and show his readiness to pay such demand at the place named, where the same became due, and this shall be deemed a valid defense in bar of such suit (permitting the plaintiff, however, to avoid such plea, by averring in his replication, and proving at the trial, a subsequent demand at the place of payment, and neglect on the part of the defendant to pay such demand.)” Stat. 1836, p. 62.

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### ROGERS v. LAMB.

**MALICIOUS PROSECUTION—CHALLENGE OF JURORS.**—In an action of malicious prosecution for causing the plaintiff to be indicted, &c., he may challenge any of the jurors who were on the grand jury that found the indictment (a).

**EVIDENCE.**—If any circumstances can be conceived, under which testimony admitted by the Circuit Court would be admissible in the case, and the record does not show the ground on which it was received, its admission will be presumed to be correct.

**SAME.**—In an action of malicious prosecution, the defendant's character is not in issue, and he cannot call witnesses to support it.

**INSTRUCTIONS TO JURY.**—The instructions to the jury, having relation to the cause, must be presumed correct, if the record does not show the testimony on the subject.

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(a) *Bradford v. The State*, 15 Ind., 347.

## Rogers v. Lamb.

SAME.—If instructions to the jury be asked for and refused, and the record do not show that there was any evidence to which they were applicable, they must be presumed to have been irrelevant and consequently improper.

[\*156] \*SAME.—In an action of malicious prosecution for causing the plaintiff to be indicted, the Court is not necessarily bound to instruct the jury, that, unless they believe the defendant guilty of perjury, they must find for him, though his evidence was necessary to the finding of the indictment.

ERROR to the *Madison* Circuit Court.

BLACKFORD, J.—This was an action of malicious prosecution, brought by *Lamb* against *Rogers*. The declaration charges that *Rogers*, maliciously and without probable cause, procured *Lamb* to be indicted for forgery; and that he was afterwards acquitted. Plea, not guilty. Verdict and judgment for the plaintiff below.

At the trial, three of the jurors were challenged by *Lamb*, because they had been on the grand jury that found the indictment against him; and the Court sustained the challenge. The cause of challenge, in this case, was good. The jurors objected to, must be considered as having expressed an opinion unfavorable to *Lamb's* right of action.

The Court permitted the plaintiff below to read to the jury an affidavit, which *Rogers* had made in the cause, to obtain security for costs. The record does not show for what purpose this evidence was offered. It may have been to explain testimony given by the defendant. Circumstances may easily be conceived of, under which this affidavit was admissible; and, in support of the judgment below, we must presume that such circumstances existed.

The defendant below offered several witnesses to sustain his character for truth. The defendant's character was not in issue; and the witnesses called to support it were correctly excluded.

The Court instructed the jury, that the conduct of *Rogers*, in making the affidavit to obtain security for costs, might be considered, and that, if the affidavit was false, it was a circumstance against him. As we do not know what testimony there

## Rogers v. Lamb.

was on the subject of this affidavit, we cannot say the instruction was improper.

The defendant below moved the Court to instruct the jury, that if it was altogether uncertain, so that the jury could not form an opinion, whether the plaintiff was innocent or guilty of the forgery for which he was prosecuted, they ought to find for the defendant. The Court refused this instruction. The record does not show whether there was any evidence [\*157] before the jury, \*to which the instruction asked for could apply. It was upon a mere abstract proposition, therefore, that the Court was required to instruct the jury; and the instruction was for that reason, at any rate, correctly refused.

*Rogers* moved the Court to instruct the jury, that unless they believed he had committed perjury in giving his evidence on the prosecution, they could not infer malice, and must find for him, it being proved that his evidence was necessary to the finding of the indictment. The motion for this instruction was properly overruled. *Rogers* may have sworn truly as to some material fact in the case, and yet have had no probable cause for the prosecution, and been influenced by malicious motives. The indictment, for example, may have been found, principally, on the evidence of other witnesses procured by *Rogers*, and whose evidence he knew to be unfounded.

*Rogers*, also, asked for the following instruction: That if *Lamb* alleges that it was by *Rogers*' authority that he affixed *Rogers*' name to the instrument which *Lamb* was charged with forging, *Lamb* must prove that fact, or the jury will presume otherwise. This instruction was refused. The Court may have refused this instruction, on the ground that *Lamb* did not allege the fact stated. If there was no evidence before the jury to which the instruction asked for was applicable, the Court could not be required to give the instruction. If there was any such evidence, the record should show it (1).

*Per Curiam*.—The judgment is affirmed with costs.

*H. Brown* and *W. W. Wick*, for the plaintiff.

*C. Fletcher*, for the defendant.

## Nooe v. Bradley and Another.

(1) The Supreme Court of the *United States*, on this subject, says: "It is objected, that there was no evidence in the case, conducing to prove the facts on which the above instruction was founded.

"The Court ought not to instruct, and indeed cannot instruct on the sufficiency of evidence; but no instruction should be given, except upon evidence in the case. Where there is evidence on the point, the Court may be called on to instruct the jury as to the law, but it is for them to determine on the effect of the evidence." *Chesapeake, etc., v. Knapp et al.*, 9 Peters, 568.

## [\*158] \*NOOE v. BRADLEY and Another.

COUNTY BOARD—ELECTION OF JUSTICE.—The board doing county business may, under the statute of 1831, order an election of a justice of the peace to supply a vacancy which had previously occurred; but they have no authority to make such an order in anticipation of a vacancy (a).

APPEAL from the *Marion* Circuit Court.

M'KINNEY J.—The plaintiff, an elector of *Marion* County and resident in *Centre* township, contested before the board of commissioners, the election of the defendants, *Bradley* and *Wingate*, respectively returned as being elected justices of the peace of that township.

The following are the grounds upon which the validity of the election was questioned: 1st, because the said election was holden without authority of law, there being no vacancies in the office of justice of the peace at the time said election was holden; 2d, because the said *Bradley* and *Wingate* did not receive the highest number of legal votes given at such election; 3d, because the said *Bradley* and *Wingate* did not receive a majority of all the votes at said election; 4th, because many, to-wit, one hundred illegal votes were received at said election, and because many, to-wit, fifty legal votes were rejected; 5th, because one of the officers of said election was incompetent to act as such.

(c) *Biddle v. Willard*, 10 Ind., 62.



A motion was made before the board of commissioners to set aside the 3d, 4th and 5th grounds of contest as insufficient, which was overruled. The board of commissioners by their judgment, declared the election void. From this judgment the defendants, *Bradley* and *Wingate*, appealed to the Circuit Court. In that Court, a motion was made and sustained to set aside the 1st, 3d, 4th and 5th grounds of contest. To the opinion of the Court sustaining that motion, *Nooe* excepted.

An agreed case, entered into by the parties, forms a part of the record. It is as follows: "In this case it is agreed, that the election was ordered to be held in anticipation of two vacancies, which were to accrue ten days after the day when the election was held, and five years, precisely, from the time of the election of the justices, whose places were to be supplied. It is further agreed, that of the votes given at said election by 403 voters, 205 were given to the said *Henry Bradley*, 191 were given to the said *Joseph Wingate*, 153 to one *Obed Foot*, 151 to *Wilks Reagan*, and 4 to one *Caleb Scudder*; and said *Bradley* and *Wingate* were declared duly elected. It is also agreed, that nothing herein contained shall be an admission of the sufficiency of the points stated as causes of contest. It is also agreed, that several tickets, to wit, 50 in number, were put in at said election, containing but one name in such ticket."

The case was submitted to the Circuit Court, and it reversed the judgment of the board of county commissioners, and rendered judgment in favour of the defendants. The case is before us by appeal from the judgment of the Circuit Court.

A number of questions are presented by the record. The principal one, however, and that upon which this case turns, relates to the authority of the board doing county business, to order an election in anticipation of a vacancy. Whether the Circuit Court erred in setting aside the 1st, 3d, 4th, and 5th points of contest, is not now material to be decided, since the agreed case substantially embodies the grounds upon which the contest was originally based. If the board doing county business had no authority to order the election, the whole proceed-

ing is void. We will inquire whether the board possessed this authority.

This question must be determined by the act "to provide for electing county and township officers." Rev. Code, 1831, p. 222. The act provides for the election of justices of the peace, and in it alone is found the authority to order such election. By the latter clause of the 7th section, it is enacted "that the board doing county business, or the clerk of the Circuit Court in recess, are hereby authorized to receive the resignation of justices of the peace, and in all cases of vacancies in the office of justice of the peace, by resignation, removal, or otherwise, the county commissioners (board doing county business), on being informed thereof, shall cause such vacancies to be filled by election, as directed in this act." Here is the power given to order an election, but not a power to be exercised *ad libitum*. It is qualified and restricted to the filling of vacancies. A vacancy may occur by death, resignation, removal, or the expiration of the period for which the incumbent was [\*160] elected. \*When the board doing county business is informed of a vacancy thus caused, it is its duty to order an election.

The board possesses a special and limited authority; and no principle is better settled, than that in the exercise of such an authority, error supervenes if its limits be transcended. The cases of *Wise v. Withers*, 3 Cranch, 331; *Rose v. Himely*, 4 Ib. 241; *Griffith v. Frazier*, 8 Ib. 9; *Denn v. Harnden*, 1 Paine's R., 55, are a few of the many adjudications that establish all proceedings to be void, which are beyond the jurisdiction of a court. The act is affirmative, and directs the manner in which the election shall be holden. It cannot be done in any other manner. 3 Mass. Rep., 307. It is also equally well settled, in relation to a special authority, that everything done under the color thereof, which is not within it, is void. 6 Bac. Abr., 383; 1 Burr. R., 447; 3 Mass. R., 21, 22. An order to elect in anticipation of a vacancy, is not within the authority given by the statute, and must be void. Whether public convenience would not be promoted by such an authority, is not a question

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Nooe v. Bradley and Another.

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for our decision. That such authority does not exist, may be a *casus omissus*, or would, from a view of the whole act, rather appear a legislative intendment.

The act provides for the election of clerks of the Circuit Courts, recorders, and associate judges, in addition to justices of the peace. By the 3d section it is provided, "that hereafter, where the term of service of any of the clerks of the Circuit Courts, recorder, or associate judge, shall be about to expire, a poll shall be opened in each township in the county on the first Monday in *August*, next preceding the expiration of his or their term of service, the return of which shall in all respects be governed by the law regulating general elections," with a proviso, that the person elected and commissioned, shall not enter on the duties of his office, until the constitutional term for which his predecessor may have been commissioned, shall have expired. Here is an express provision for elections in anticipation of vacancies. It is, however, specific and determinate, and does not leave at large such elections. They are to take place on the first Monday in *August* next preceding the expiration, &c. It would seem reasonable, that if other elections were to be in anticipation of vacancies, there should be a specific time authorized, at which they should take place. By no \*rule applicable to the construction of a statute, can a justice of the peace be embraced within it.

It is contended by the appellees, that the 63d section of the act regulating the jurisdiction and duties of justices of the peace, warrants a construction, by which the order for the election in anticipation of a vacancy is justified. We have examined the section, and entertain an opposite opinion. The first branch of the section provides, "whenever the office of any justice of the peace shall become vacant, all the dockets, papers, and public laws or statutes pertaining to his office, shall, if a successor be chosen and qualified at the time, be delivered over to him; but if no successor be chosen and qualified, then to the nearest justice in the township," &c. In this provision, there is no reference to an order of election by

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 Bradfield v. M'Cormick, Assignee.
 

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the board doing county business—no enlargement of the power of such board; nor can we deduce from a section, which is directory as to the disposition of the docket, &c., of a justice when a vacancy has occurred, a principle by which to legitimate an order for an election, when the power to issue such order is not given. The act, as its title purports, regulates the jurisdiction and duties of justices of the peace, but does not prescribe the mode of filling a vacancy.

We are therefore clearly of opinion, that the Circuit Court erred in rendering judgment in favour of the defendants, *Bradley and Wingate*.

*Per Curiam*.—The judgment is reversed with costs.

*H. Brown*, for the appellant.

*C. Fletcher, S. Merrill and H. Gregg*, for the appellees.

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### BRADFIELD v. M'CORMICK, Assignee.

SEAL.—An instrument of writing executed with a scroll, instead of with a wafer or wax seal, is a sealed instrument.

SEALED NOTE.—If a note under seal for money be payable on demand, a suit lies on it without making a previous demand (a).

SAME.—If in an action on a sealed note for the payment of a sum certain, there be a demurrer to the declaration, and judgment for the plaintiff, the Court may assess the damages.

[\*162] ERROR to the *Tippecanoe* Circuit Court. The judgment in this case was affirmed during this term; and, on a petition for a re-hearing, the following opinion was delivered:

M'KINNEY, J.—This is an action of debt brought on a writing obligatory. The declaration demands \$142.18 $\frac{1}{4}$ , balance due. The defendant craved *oyer* of the instrument declared on, and filed a demurrer to the declaration. On joinder, the demurrer was overruled, and judgment rendered

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(a) *Harden et al. v. Wolf, etc.*, 1 Ind., 31.



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in favour of the plaintiff for \$142.18 $\frac{3}{4}$  debt, and sixteen dollars and fifty cents damages and costs. The following instrument was set out on *oyer*: "On demand, we or either of us promise to pay *Joseph Williamson*, or order, the just sum of \$150, for value received of him, as witness our hands this 16th day of *November*, 1829. *John Bradfield*, [L. S.] *Benjamin Bradfield*, [L. S.]" Three points are made by the plaintiff in error: 1. The instrument declared on is not a writing obligatory; 2. The declaration is defective for want of an averment of a special demand, as the amount of the note was payable on demand; 3. The Court erred in not calling a jury to assess the damages.

The first question was decided by this Court in the case of *Vanblaricum et al. v. Yeo, administrator of M'Kay*, November term, 1830. We regard the decision in that case as founded upon a sound construction of the statute.

As to the second point, the plaintiff demands \$142.18 $\frac{3}{4}$ , and avers in the declaration a credit to be endorsed on the note, reducing it from \$150 to the amount claimed. When the credit was entered on the note does not appear. In support of the judgment, we will presume it made about the time the note was executed. The demand is not necessary to sustain the action; it could only affect the amount of demand. The demand of payment should relate back to the time of the credit endorsed. A calculation of interest, founded on this presumption, gives an amount varying but a few cents from the damages given in the Circuit Court. We think the second objection cannot be sustained (1).

The third point was settled by this court in the case of *Tannehill v. Thomas*, 1 Blackf. R., 144. The statute of 1831, regulating the practice in suits at law, section 41, expressly authorizes the course pursued by the Circuit Court.

[\*163] \**Per Curiam*.—The judgment is affirmed with five per cent. damages and costs.

*C. Fletcher* and *W. M. Jenners*, for the plaintiff.

*A. S. White*, for the defendant.

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(1) If a bond, bill of exchange, or promissory note, be payable on demand, interest runs from the day of the demand; if no day of payment be specified, the money is due immediately, and interest is calculated from the date. 2 Stark. Ev., 419

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### VARNER v. VARNER, in Error.

SUITS for divorces must, under the statute, be instituted in the courts of common law, and not in the courts of chancery (1).

(1) Rev. Code, 1831, p. 214. The 8th section of the statute, upon which this decision was founded, is now repealed; and the jurisdiction of suits for divorces is expressly given to the courts of chancery. Stat. 1833, p. 32.

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### CHUN and Another v. HOWARD and Another.

CONTRACT—PLEADING.—In a suit on a contract to deliver a certain number of hogs to the plaintiff, to be paid for on delivery, the declaration must aver a payment or tender of the purchase money, or a readiness to receive and pay for the hogs.

ERROR to the *Wayne* Circuit Court.

M'KINNEY, J.—This is an action of trespass on the case, founded on a special contract.

The plaintiffs state a contract with the defendants for 150 hogs, with the privilege of delivering 300 at *Newcastle, Henry* County, at a given price, to be paid on delivery. The contract is shown to have been frequently varied, and the sums of fifty dollars and \$300 to have been paid. They then declare that afterwards, &c., when the said hogs were to be delivered  
[\*164] and received, the said parties enlarged said contract, and it was agreed that the defendants had then and there 705 hogs, and that the plaintiffs should pay all expenses of driving said hogs to *Hamilton, Ohio*, and pay all

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damages in driving the same, and pay to the defendants, at *Hamilton*, \$3,373.70 for said hogs, deducting \$350 paid as aforesaid. The plaintiffs further declare that afterwards, on, &c., after the said hogs were driven to *Hamilton* at their own expense, to wit, at the expense of \$200, it was then agreed between the parties that the plaintiffs should proceed to *Cincinnati*, and drive the hogs at their own expense, and pay the defendants for going with said hogs to receive their pay, and also pay their expenses on the road, and pay them for the hogs agreeably to their last named agreement.

The plaintiffs aver that they took said hogs to *Cincinnati* at their own expense, paid the expenses of the defendants in going to *Cincinnati*, and paid them for going; that afterwards, at *Cincinnati*, the plaintiffs, with the consent and knowledge of the defendants, sold said hogs to *Voorhis & Vankirk*, for the sum of six dollars per head, there then being 668 hogs only, making the sum of \$4,008 for said hogs, and received from the vendees \$500 in hand, which they paid to the defendants, making the sum of \$850 paid on said contract. They aver that it was a part of their agreement with *Voorhis & Vankirk* that they were not to have possession of the hogs until the whole of the purchase-money was paid.

They aver that while the hogs were in their possession as aforesaid, and subject to their control, and before *Voorhis & Vankirk* had paid the balance of the money due on the same, and before they had acquired a right to the same, without a payment or tender of the purchase-money, the defendants, without the permission of the plaintiffs, and against their consent, fraudulently and deceitfully, with intent to deprive the said plaintiffs of the benefits of their said sale, and with intent fraudulently, wrongfully, and deceitfully, to cheat and defraud the plaintiffs out of said hogs and the expenses of driving the same from *Newcastle* to *Cincinnati*, and to cheat them out of the \$850 paid on said hogs, sold the same to another person for the sum of \$5.10 per head, and received fraudulently and deceitfully for the same, the sum of \$3,406, and suffered

[\*165] them to be driven out of the reach \*of the plaintiffs,

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so that they lost the same. They aver the defendants' refusal to pay the sum of \$850, or the difference between the sums for which the hogs were sold, or to pay the expenses, &c.

To the declaration the defendants demurred specially, and assigned the following cause: "The plaintiffs do not show a readiness to comply with their part of the agreement, by either paying or tendering to the defendants the purchase-money agreed to be paid by them for said hogs." The Court sustained the demurrer and rendered judgment in favour of the defendants.

The declaration is founded on a special contract, and the ground of relief is fraud committed by the defendants.

The contract was frequently varied by the parties. It is apparent, however, that the payment of the purchase-money was steadily regarded as a condition precedent to the delivery of the property. If the plaintiffs neither paid nor tendered the purchase-money, their right to the possession of the property has not attached, unless such payment or tender be excused by the act of the defendants. The performance of the contract on the part of the plaintiffs, or what the law regards as equivalent,—doing all in their power to perform it,—alone entitles them to the possession of the subject-matter of the contract, and enables them to bring an action on the contract itself, or an action in tort for a wrong done. The right of possession is essentially necessary, however, to the support of either action. It is immaterial what is the form of action, the necessity exists for the averment of payment or tender of the purchase-money; the payment being a condition precedent to the delivery of the property. 3 Stark. on Ev., 1637; 2 Bl. Comm., 448; *M'Donald v. Hewett*, 15 Johns., 349; *Clarkson v. Carter*, 3 Cow., 84; *Morton v. Lamb*, 7 T. R., 121.

Although the payment or tender is necessary, yet it may be waived. It is contended that it was waived in this case by the defendants' consent to the sale made to *Voorhis & Vankirk*, in *Cincinnati*. We cannot regard that sale as operating such waiver. Indeed, that consent is qualified by the contract made by the plaintiffs with *Voorhis & Vankirk*, by which the latter were not to have possession of the hogs until payment of the



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purchase-money. The consent to such sale was no more than the general authority to sell, which the sale to the [\*166] plaintiffs \*enabled them to make, subject to the divestment of the defendants' possession, by the payment of the purchase-money.

It would seem to follow, from the view taken of the case, that if this suit is brought on the contract, to have maintained it, the plaintiffs should have averred payment, a tender of the purchase-money, or a readiness to receive and pay for the property. If brought for a tort, they should have shown themselves entitled to the possession.

The declaration is an unusual one. We have seen no precedent that supports it, nor would it seem to be justified on principle. It is attempted to rear upon a contract unperformed on the part of the plaintiffs, a cause of action arising from fraud alleged to be committed by the defendants. We question whether this can be done in any case. It is clear, it cannot in the present. The plaintiffs' right to the property depended upon a condition precedent, and that was not performed. The interest of the defendants was not therefore divested (1).

We think the Circuit Court was correct in sustaining the demurrer.

*Per Curiam*.—The judgment is affirmed with costs.

*O. H. Smith and J. Rariden*, for the plaintiffs.

*M. M. Ray and J. Perry*, for the defendants.

(1) In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price,—it is sufficient for the plaintiff in his declaration to aver such request, and that he was *ready* and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring an actual tender of the price. *Rawson et al. v. Johnson*, 1 East., 203. For forms of declarations in *assumpsit* for not delivering goods, &c., see 2 Chitt. Pl., 269, 270, 6th Amer. ed.

END OF NOVEMBER TERM, 1832



[\*167]

# \*CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1833, IN THE SEVENTEENTH  
YEAR OF THE STATE.

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FARNHAM v. HAY.

DEBT.—Note under seal for the payment of \$220, one-half payable in one year, and the other half in two years, with interest. *Held*, that *debt* would not lie on the note, until the last payment was due.

PLEADING—JOINDER.—In debt, a count on a specialty and one on simple contract may be joined.

DEMURRER.—If a declaration contain one good count, a demurrer to the whole declaration must be overruled.(a)

ERROR to the *Washington* Circuit Court.

M'KINNEY, J.—This is an action of debt. The declaration contains three counts. The first demands \$110, and is founded upon a writing obligatory, by which the defendant promised to pay the plaintiff the sum of \$220, one-half to be paid in one year, and the other half in two years from the date, with lawful interest. The sum thus demanded is the amount agreed

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(a) *Urton v. Lackey*, 17 Ind., 213; 23 Id., 507, 265; 11 Id., 458; 9 Id., 241.

to be paid in one year, it only having become due. The second is for the same amount, the half of \$220 borrowed of the plaintiff, and agreed to be paid in one and two years. The sum claimed in this count is also the amount agreed [\*168] to be paid in one year, it being then due. The \*third count is for \$110 advanced, laid out, and expended for the defendant, at his special request, and agreed to be repaid to the plaintiff, with lawful interest, in one year. The defendant, on *oyer*, demurred to the declaration. The demurrer was sustained and judgment rendered in his favour. The correctness of this judgment is questioned by the plaintiff in error. If either of the counts be good, the demurrer should have been overruled.

The two first counts are for the recovery of the half of a sum of money agreed to be paid by installments, in one and two years, the whole debt not having become due. The law appears to be settled, that debt cannot be sustained for money payable by installments, till the whole debt is due, unless the payment be secured by penalty. 1 Chitt. Pl., 106; *Rudder v Price*, 1 H. Bl., 547; 2 Saund., 303, n. 6. Only one installment of the sum agreed to be paid, was due at the time this suit was instituted, consequently the action of debt was not appropriate. We cannot perceive that the operation of this rule can prove injurious; for if the contract be under seal, upon non-payment of the installments as they respectively become due, the party has his remedy by action of covenant; or, if by parol, by that of assumpsit. *Tucker v. Randall*, 2 Mass., 283; Bac. Abr. debt, b.; Com. Dig. action, f.; Co. Litt., 292; 1 Chitt. Pl., 93, 113. From this view the two first counts must be regarded as defective.

The third count, however, is not liable to the same objection; but as it is urged that it is insufficient, we will examine it and notice the defects that are suggested. This count is on a simple contract, and may be joined in the same action with debt on bond, or other specialty, or with debt on judgment. 1 Chitt. P., 196; Bac. Abr. action, c.; Com. Dig. action, g.; 13 Johns., 462. Chitty (in 1st vol. on Pl., 397), speaking of



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different counts for the same cause of action, says: ‘‘Though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former.’’ The rule is certainly more positive, requiring entire independence and sufficiency in counts, when in the same declaration are joined different causes of action, and whether a plaintiff whose declaration contains more than one count, claims a recovery [\*169] upon one right of action only, or upon \*several, cannot appear except in evidence. Gould’s Pl., 171.

When counts are thus joined, they must be considered as constituting distinct causes of action, and a defect in one does not attach to the other. In an action thus brought, the defective count should be demurred to; but if, instead of a defective count, there is a misjoinder, the declaration would be bad on general demurrer. The third count may therefore contain a good cause of action, and, if the objection taken be not available, the Circuit Court erred in rendering judgment in favour of the defendants.

This count is in the common form of a count for money laid out, &c., and conforms to the precedents in all the essentials of such a count, but it is thought defective, from the fact of its claiming the same sum demanded in the others, from a conformity to the time to which the respective sums are stated to have become due, and from a presumption arising from the record which we can not indulge, that the debt is claimed on the same contract. We do not think this objection good. If the debt were claimed on the same contract, the question of the rejection of evidence establishing this, would be proper on the trial, for the defendant is correct in saying that debt will not lie on a simple contract, when that contract is under seal; but it is equally correct, when debt is brought on a simple contract, that the fact whether that contract is merged by a specialty, is beyond the limits of legal presumption, and can only be known when evidence is introduced in support of the action. The demurrer only reaches apparent defects.

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The court is also thought insufficient, because it does not state in the commencement, that the defendant owes and detains the debt, nor does it charge in the conclusion the non-payment of interest, or allege a sufficient breach. This objection is as untenable as the former. As to the first, it is only necessary to say, that the first and second counts being insufficient, the commencement of the declaration applies exclusively to the third. The breach is in the usual language, and, as respects interest, it is a question which, as the one previously examined, is proper for the jury. It is a rule at common law, that interest should be demanded in the beginning, through the declaration, and its non-payment form a part of the breach, for it is not allowed if not [\*170] demanded in the declaration. *Hubbard v. Blow & Barksdale*, 1 Wash. R., 70; *Brooke v. Gordon*, 2 Call. R., 212; *Wallace et al. v. Baker*, 2 Munf. R., 334.

We are therefore of opinion that the third count is good, and that the demurrer being to the whole declaration, should have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. H. Farnham*, for the plaintiff.

*H. P. Thornton*, for the defendant.

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### HUSTON and Another v. WILLIAMS.

**PLEADING—EVIDENCE.**—To an action of debt on bond, the defendant may plead generally that the bond was obtained by fraud, covin, and misrepresentation; but the evidence, under this plea, must be confined to the fraud of the obligee in relation to the execution of the bond (a).

**ERROR** to the *Fountain* Circuit Court. *Benjamin Williams* brought this suit against *Robert* and *Hamilton Huston*, and obtained a judgment in the Circuit Court.

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(a) *Kernodle v. Hunt*, 4 Blackf., 57; *Clark et al. v. Harrison*, 5 Id., 302.

STEVENS, J.—The plaintiff declared in an action of debt upon an instrument in writing, which is described in the declaration as a “writing obligatory, signed with their hands and sealed with their seals.” The defendants, after craving *oyer*, demurred to the declaration. The Court overruled the demurrer, and the defendants, by leave of the Court, withdrew it and pleaded to the merits. The plea of the defendants is a plea of “fraud, covin, and false representation,” in these general terms, without stating the special circumstances, and without averring whether the “fraud, covin, and false representation,” relate to the execution of the instrument, or to the consideration or inducement which influenced the obligors to become bound. To this plea the plaintiff demurred and the Court sustained the demurrer.

The errors assigned are: 1. The instrument declared on is not a writing obligatory; 2. The Court erred in sustaining the demurrer to the plea.

As to the first error, it is only necessary to say that the withdrawal of the demurrer containing the *oyer*, [\*171] withdrew the *oyer* \*also, and it ceased to be any part of the record; and we are bound now to presume that the description given in the declaration of the instrument in writing is correct. .

The other error presents much more difficulty. The question is, whether a plea of “fraud, covin, and false representation,” pleaded in these general words, can be a good plea in bar to an action of debt on a writing obligatory, and, if good, to what extent?

At common law, in an action of covenant or debt on a writing obligatory, a plea of “fraud, covin, and false representation,” is a good plea in bar if properly pleaded. But it appears that such a defense only relates to “fraud, covin, and false representation” in the execution of the writing obligatory, and not to the consideration or inducement which influenced the obligor to make the bond. Also, illegality, or any act or matter connected with the contract or consideration which strikes at the contract itself, and shows that it never had any legal entity,

and which renders the bond wholly void, is a good defense at common law; but such defense can not be given in evidence under a general plea of *non est factum*, or of fraud and covin: the special facts must be averred. But where the fraud, covin, and false representations, which are set up as a defense to a bond, are respecting the right, title, amount, soundness, quantity, quality or value of the consideration which influenced the obligor to make the bond, the defense is equitable, and not legal, at common law. Neither is the failure in part, or in the whole, a legal defense at common law: it is only a defense in equity.

Our statute has made such defenses legal, in actions on bonds and writings obligatory, except conveyances of real estate and instruments negotiable by the law merchant. Under the statute, the entire want of consideration, or the failure in whole or in part of the consideration, may be pleaded to actions on bonds or writings obligatory; but the manner of pleading is not changed: the pleading must be according to the common law. A plea that a bond is voluntary, and without either a good or valuable consideration, is sufficient without any averments more special, because in such case there are no special facts to aver. But if the defense is founded upon a failure in the whole or in a part of the consideration, or upon the false, fraudulent and convinous acts and representations of the obligee

[\*172] \*respecting the consideration which influenced the obligor to become bound, the special facts must be averred.

If, however, the defense is bottomed on the false, fraudulent, and convinous conduct of the obligee, in relation to the execution of the instrument, as where it is fraudulently misread, or another instrument fraudulently substituted for the true one, or where the obligee fraudulently induces the obligor to execute the instrument when he is incapable of judging for himself, either by reason of drunkenness or lunacy, or where the obligee does any other fraudulent act which shows that the obligor, in truth and in fact, never, in the eye of the law, executed the bond, the facts may be given in evidence under the plea of *non est*



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*factum*, or they may be given in evidence under a general plea of "fraud, covin, and false representation." *Taylor v. King*, 6 Munf., 358; *Wyche v. Macklin*, 2 Rand., 426; *Vrooman v. Phelps*, 2 Johns. R., 177; *Dorlan v. Sammis*, note to 2 Johns., 179; *Dorr v. Munsell*, 13 Johns. R., 430; *Parker v. Parmele*, 20 Johns. R., 134; *Collins v. Blantern*, 2 Wils., 347; *Dale v. Roosevelt*, 9 Cow., 307; *Stevens v. Judson*, 4 Wend. Rep., 471. In this limited sense the plea under consideration is good, and ought to have been sustained, but no evidence can be given under it, except such as relates to the execution of the instrument.

It may perhaps be thought that this opinion conflicts with the opinion of this Court, in the case of *Pence et al., adm'rs, v. Smock*, 2 Blackf., 315, and the authorities there cited; but it is presumed that a correct examination of that case, and those authorities, will show that there is not perhaps any confliction. The circumstances of the case of *Pence et al. v. Smock* are these: *John Smock*, the intestate, in his life-time, made his bond to *Peter Smock*, and, after his death, *Peter Smock* brought suit on it against *Pence* and *Brenton*, his administrators, and they pleaded generally that the bond was obtained of *John Smock*, in his life-time, by *Peter Smock*, by "fraud, covin, and false representation." This plea was pleaded by administrators, who the law does not presume were in possession of the particulars of the fraud, they not being parties or privies to the transaction, and were therefore authorized to plead generally; for it is a settled principle of pleading that general words are sufficient where it is to be presumed that the party pleading is not acquainted with the minute circumstances of the

[\*173] case. \*1 Chitt. Pl., 239. *The People v. Dunlap*, 13 Johns. Rep., 437. Again, the plea in the case of *Pence et al. v. Smock* does not conflict with the opinion in this case, because there is nothing on the record to show that the "fraud, covin, and false representations," were intended to apply to anything other than the execution of the bond. Indeed, the record proves almost conclusively that they were not intended to apply to anything other than the execution of the bond,

because there is another plea showing specially the failure of the consideration.

The authorities relied on by our Supreme Court, in the case of *Pence et al. v. Smock*, are next to be noticed.

The first is Chitty's Pleadings. Chitty, in his first volume, says that fraud and covin is a defense to a bond at common law. He must certainly allude to fraud and covin in the execution of the bond, because no doctrine is better settled than the doctrine that fraud, falsehood, or deceit, respecting the consideration, is no legal defense at common law to a bond. It is otherwise with respect to simple contracts. But when applied to a bond, it is a defense in equity only, unless it is made a defense at law by statute. Again, he says in the same volume, that such fraud and covin may be pleaded generally. This is correct when applied to the execution of the bond, but it cannot at common law be applied to the consideration. He refers to *Tresham's Case*, 9 Co. Rep., 108. The case called *Tresham's Case*, is the case of *Brokesby and Vaux, adm'rs of Henry Vaux, Esq., v. Tresham, adm'r of Sir Thomas Tresham*. It was an action upon a bond made by Sir Thomas in his life-time, to Henry Vaux, Esq., in his life-time. The defendant pleaded *plene administravit*, and also divers outstanding recognizances against the estate made by Sir Thomas in his life-time, which were outstanding and unpaid. The plaintiffs replied as to the recognizances, that they were all paid and performed, but that the defendant kept them on foot outstanding against the estate by fraud and covin, for the purpose of cheating the plaintiffs out of the debt due on the bond. This replication was very correctly decided to be good, for two obvious reasons: First, because it is as special as the nature of the case would admit of. It states the whole transaction, that is, that those bonds and recognizances were all paid and performed, but that the defendant refused to lift them and take them in, for the fraudulent purpose of pleading them as outstanding

[\*174] against the bond on \*which the suit was brought.

There was nothing more special in the nature of the case. And it is a well settled rule in pleading, that fraud,

covin, or anything else, may be averred generally, where there are no special facts connected with the defense. In that case, the special facts were the payment and performance of the recognizances, and these were specially averred. Secondly, it was pleaded by the administrators of a creditor, and the law presumes a creditor always a stranger to the acts of the administrator of the debtor, and therefore he is allowed to plead generally. *The People v. Dunlap*, before cited, and *Wimbish v. Tailbois*, Plowd. R., 38.

Chitty, in his second volume on pleading, gives the form of a plea of fraud, covin, and false representation, specially setting out the facts, and adds at the bottom of that form, that a plea of general fraud and covin may be added. Forms are not law, but they ought to be evidence of what the law is. Chitty refers to no authority to sustain his general plea, but his special plea he sustains by the cases cited in his note. The first one is the case of *Cockshott et al. v. Bennett et al.*, 2 T. R., 763. This case has nothing whatever to do with the principle, nor do any of the judges say anything in relation to it. It was an action of assumpsit on a simple contract, and the whole controversy was about the effect of such acts of fraud in courts of law and courts of equity. The second case is the case of *Hayne v. Maltby*, 3 T. R., 440, and is directly in point to support the special plea, but says not a word about a general plea, or that such a plea ever was or ever could be so pleaded.

The next case relied on by our Supreme Court, is the case of *Wimbish v. Tailbois*, Plowd. Rep., 38. This was an action of trespass done in lands, brought by *Wimbish* and wife against *Elizabeth Tailbois*, widow of *George Tailbois*, deceased. The defendant, *Tailbois*, set up title to the lands and justified. The plaintiffs, among other things, replied that a certain recovery in *formedon in descender*, which one *William Tailbois* brought, was by covin between the said *William*, and the said *Elizabeth Tailbois*, the defendant, without the assent or consent of the plaintiffs, *Wimbish* and wife. This replication was sustained by a majority of the Court, Justice *Brown* dissenting. The judges delivered their opinions *seriatim*, and gave specially

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their reasons for sustaining the replication, which are: 1, because the law does not require a person to aver that [\*175] which the \*law does not presume he knows, and that the covin in that case was between the defendant and a third person, in a certain transaction to which the plaintiffs were entire strangers, and therefore not presumed to know the minute particulars; 2, that the replication was pleaded under and by virtue of a statute, respecting covinous recoveries of real estate by women, and was authorized in that general form by the statute. But they all explicitly stated that, at common law, the special facts must be averred. Justice *Brown*, in dissenting, said that although the statute was general, yet the pleading ought to be according to the common law, and, by the common law, the cause of covin must be shown.

The next case cited by our Court, is the case of *Gordon v. Gordon*, 1 Stark. Rep., 294. There is nothing in this case to show whether the plea was general or special, or to show what it related to. There was no opinion on the plea, nor does it appear to have been brought into question. The case went off on other grounds. The reporter simply adds, that there was also a plea of fraud and covin; but whether it was a general or special plea, is not shown.

In the case of *Sherwood v. Johnson*, 1 Wend. Rep., 443, a general replication of fraud and covin was sustained. This was a suit by a creditor of the testator in his life-time, against his executor after his death, and the fraud and covin set out in the replication, were charged to be fraud and covin committed by the testator and the executor in the life-time of the testator, in a transaction to which the creditor was neither a party nor privy, and therefore he was authorized to plead generally, the law not presuming him to be acquainted with the special circumstances. This case is, in principle, precisely like *Tresham's Case*, and does not conflict with anything in this opinion.

If this view of the case is correct, and we think it is, the judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.



M'KINNEY, J.—Dissenting from the opinion just delivered. it would seem proper that I should give the reasons upon which that dissent is founded. In examining the question, I shall advert to the common law; to adjudications in some of our sister states; to some statutory provisions; and to the case of *Pence et al. v. Smock*, decided by this Court at its *May* term, 1830.

[\*176] \*The general proposition is admitted, that fraud is a defense at law; but from this admission, it does not of consequence follow, that as a defense it is applicable, without qualification, to all actions, or that when appropriate, it is in the election of the pleader to use either a general or a special plea. Pleading is a science, and as such is governed by rules. When exceptions occur in the operation of these rules, they are supposed to be founded on the original inapplicability of the rule to the development of a principle, or upon some innovation or modification of the doctrine to which the rule applies, rendering its enforcement a defeat of the object proposed to be attained. Without dwelling upon the system, with its rules “founded in strong sense and the soundest and closest logic,” peculiar to the various actions, promoting justice, and protecting against the greatest of evils in judicial proceedings, uncertainty and confusion,—I will only remark, that to an action of debt on a specialty, the general issue is *non est factum*, and that matter legally in avoidance of the action, and unconnected with the execution of the instrument, must be specially pleaded.

To present the question of the admissibility of this general plea of fraud, so as to prevent any misapprehension of my view of it, it is necessary to examine what evidence may be given under the plea of *non est factum*, and what matters in avoidance of a deed, should be specially pleaded.

A deed is either void at common law *ab initio*, or it is voidable. When it is the foundation of a suit, the defendant may give in evidence under the plea of *non est factum*, which plea is merely to the execution of the instrument, that it was void *ab initio*, as that it was obtained by fraud, a different instrument

being substituted from that which the defendant supposed he was executing; that he was made to sign the instrument when so drunk as not to know what he did; that it was made by a married woman, &c.; or that it became void after it was made, and before the commencement of the suit, by erasure, alteration, addition, &c. 1 Chitt. Pl., 479; *Collins v. Bluntern*, 2 Wils., 341, 347; *Lambert v. Atkins*, 2 Camp. R., 272, 273; *Van Valkenburgh v. Rouk*, 12 Johns., 337; 1 Phill. on Ev., 128; *Pitt v. Smith*, 3 Camp. R., 33; *Dorr v. Munsell*, 13 Johns. R., 430; 6 Com. Dig. Pl., 2 w 18. But where the deed is merely voidable, on account of infancy or duress, or void by statute, as in the case of gaming, &c., such matters must in [\*177] general be \*pleaded. *Ibid.* In 6 Com. Dig. Pl., 2 w 18, treating of *non est factum*, it appears that that plea is good in all cases, where the bond or specialty was not executed, or, if it was executed, was void *ab initio*, and if void *ab initio*, that the facts which make it so may be averred and specially pleaded; but that it is no plea when the deed is only voidable, in which event, the matter of avoidance must be specially pleaded. It would thus seem, that matter which shows the deed to be voidable, must be specially pleaded, but that matter which shows the deed to be void, may either be given in evidence under the plea of *non est factum*, or be pleaded specially.

A special plea must state the facts constituting the defense on which the defendant means to rely, and, consequently, in adopting a special plea, embracing matter which could be given in evidence under the plea of *non est factum*, or which shows the deed to be voidable, the party is bound to present those facts in his plea. This is necessary to enable the court to determine, if an issue in law be joined, whether the facts so pleaded constitute a legal defense; or, if an issue to the country and a verdict, whether a judgment can be rendered. At common law, a seal importing a consideration, the want or the failure of consideration was not a defense, because the party would thus contradict his solemn oath. A distinction, however, exists between the illegality of the consideration, and the

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want or the failure of the consideration. The former, as we have seen, as it would show the bond to be void, it affecting its execution, could be given in evidence under the plea of *non est factum*, or be specially pleaded; the latter was only an equitable defense. If, then, fraud be the ground of defense to an action on a deed, if it be not given in evidence under the plea of *non est factum*, it must be specially pleaded.

On examination, I have been unable to find a single adjudication, other than that of *Pence et al. v. Smock*, in support of a general plea of fraud to an action on a deed, although I have met with two or three cases, in which such pleas have been filed, but these cases appear to have been decided without reference to such plea. From the general principles of the law, it would seem that such a plea could not be sustained, and from a decision to which I will refer, the reasons why such a plea is not good, are, to my satisfaction, irrefutably presented.

A general plea such as that before me, with the exception, [\*178] perhaps, of the verification, would appear to be warranted by a suggestion of Chitty, at the conclusion of the form he gives of a special plea of covin and fraud, in 2d vol. on Pl., 512; and in a note to that plea he says, "that fraud is a defense at law." He cites in support of this position *Cockshott v Bennett*, 2 T. R., 765, and *Hayne v. Maltby*, 3 Ib., 438. The first was assumpsit, the plea special, and unquestionably from the action, the defense proper. The second was covenant, but the case does not sustain a general plea, nor does it establish that fraud is a defense on a specialty. The pleas were special and the deed not contradicted, but avoided by collateral matter, and Lord *Kenyon*, in answer to the objection of an estoppel, and distinguishing the case before him from one relied on, assumed ground entirely opposite to the support of a plea *per fraudem*, such as is now under examination. These cases, therefore, neither support the plea, nor the unqualified dictum of Chitty, "that fraud is a defense at law."

In *New York*, in a series of adjudications, although fraud is admitted to be a defense in the action of assumpsit, it is denied

to be such in an action on a bond. *Dorlan v. Sammis*, 2 Johns. R., 179, in a note; *Vrooman v. Phelps*, 2 Ib., 177; *Beecker v. Vrooman*, 13 Ib., 302; *Dorr v. Munsell*, 13 Ib., 430; *Parker v. Parmele*, 20 Ib., 130; *Dale v. Roosevelt*, 9 Cow. R., 307; *Stevens v. Judson*, 4 Wend. R., 471.

In *Dorr v. Munsell*, which was debt on a bond, there were three pleas—1, *non est factum*; 2, a special plea of fraud; 3, a general plea of fraud. On demurrer to the 2d plea, C. J. *Spencer* said: "At law, the defendant cannot avoid a solemn deed on the ground of a want of consideration. That inquiry is precluded by the very nature of the consideration. In some elementary writers it is said, that fraud may be given in evidence under the plea of *non est factum*. This must be confined to cases where the fraud relates to the execution of the instrument; as if a deed be fraudulently misread, and is executed under that imposition, or where there is a fraudulent substitution of one deed for another, and the party executes a deed he did not intend to execute." The plea was adjudged insufficient.

*Dale v. Roosevelt* was an action of covenant, and *non est factum* was pleaded with a stipulation, "that the defendant might give in evidence under the plea, all matters which he might do, as if the same had been specially pleaded, or notice [\*179] thereof given." \*The defendant offered to prove that the execution of the bond had been induced by the fraudulent representations of the plaintiff, that the lands mentioned in it contained a coal mine, which was untrue: the offer was overruled. It was said, "the offer was no more than to prove a partial failure of consideration, and that this was no defense to a sealed instrument. Matter may be shown, which strikes at the contract itself, in such a manner as to show it had no legal entity, as usury, simony," &c. The well-settled distinction was also taken in this case, between the illegality of the consideration, and the want or failure of consideration, and the Court said, "that any matter which shows the consideration illegal by the common law or statute, may be given in evidence under *non est factum*, and that in a court of law, a bond cannot be invalidated for any other cause than the illegality of



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the consideration, as when the bond is void in law or procured by fraud."

The cases of *Chew, ex'r. of Wormeley, v. Moffett*, 6 Munf. R., 120, and *Taylor v. King*, Ib., 358, are accordant, and show that fraud cannot be pleaded to an action at law on a bond, and limit its proof on the plea of *non est factum*, to the mere execution of the deed; and in a late case, *Tomlinson's adm'r. v. Mason*, 6 Rand. R., 169, in an action on a bond, that court has said, in relation to a general plea of fraud, covin, and misrepresentation, "The third (alluding to that plea) does not state whether the fraud and misrepresentation affected the consideration of the bond, or the manner of its execution, and therefore presents no point on which an issue could be taken, or judgment rendered."

We have a statute which authorizes a defendant to allege, by "special plea," the want or failure of the consideration of a specialty. This is unquestionably an important change, and a great improvement of the common law; but it surely does not amount to a radical change of all the rules of pleading governing actions on specialties, nor can the statute, authorizing a "special plea" of the want or failure of the consideration of a specialty, be construed to alter the rules of evidence applicable to the plea of *non est factum* and other pleas, or legitimate a general plea of fraud, which leaves at large the application of testimony under it. The statute permits a defense at law, which was previously confined to a court of chancery; and when it authorizes a defendant, by "special

plea," to allege the want or the failure of the consideration, it could not contemplate \*that a general plea [\*180] *per fraudem*, without setting out the facts relied on, and applying them either to the want or to the failure of the consideration, would be sufficient. The word "special," applied to a plea, has a known, legal, and technical import, to which I have adverted, and of which it is inadmissible to presume the legislature to have been ignorant. The statute provides two separate and distinct grounds of relief at law, by special plea, neither of which was available at common law.

In the language of the Court in the case of *Tomlinson's adm'r v. Mason*, may I not say, "that this plea does not state whether the fraud and misrepresentation affected the consideration of the bond, or the manner of its execution, and therefore presents no point on which an issue could be taken or judgment rendered." Exclusive, however, of this decision, directly in point, and of our statutory provision, I regard the plea as insufficient, and opposed to the principles to which, sustained by authorities, I have adverted.

Before I direct my attention to the case of *Pence et al. v. Smock*, I will remark, that the want or the failure of the consideration of a specialty, may arise from circumstances unconnected with fraud on the part of the obligee, or may arise from his fraudulent act. The statute does not seem to contemplate fraud as essential to either defense; but when either is used, it must be by "special plea;" consequently, the plea in this case, being general, cannot apply. Its application to the execution of the specialty is equally as inadmissible, since, from the positions assumed, matter of that character, if not admissible under the plea of *non est factum*, must be specially pleaded.

From this examination, in which the common law and its exposition by enlightened courts, and our particular statutory provisions are presented, I am brought to the conclusion that the Circuit Court was correct in its judgment. Here I would willingly stop, but as my opinion is in conflict with the case of *Pence et al. v. Smock*, which has been reviewed in the opinion just delivered, and recognized as law, it would seem proper that I should, also, examine the principles of that case.

In that case, at its *May* term, 1830, this Court held a plea, such as the present, good, and say, "the objection is, that the particulars of fraud are not set out. This general mode of pleading fraud, we conceive to be correct. It is supported by good authority." *Wimbish v. Tailbois*, 1 Plowd. R., [\*181] 38, 54; \**Tresham's Case*, 9 Co., 108; 3 Chitt. Pl., 563; *Mason v. Evans*, Cox's R., 182; *Gordon v.*

## Huston and Another v. Williams.

*Gordon*, 1 Stark. R., 294. are cited. These cases do not establish to my satisfaction the sufficiency of the plea. They are decisive of the law as far as they go. They relate, however, to replications and to pleas presenting matter collateral to actions, and not to such as constitute their foundation. The case of *Tailbois* was trespass *quare clausum fregit*: plea *liberum tenementum*; and replication thereto, covin in the recovery of the land set out in the plea. The replication was founded on the statute 11 Hen., 7. c. 26, by which it is enacted, "That upon recovery by covin, it shall be lawful for the person to enter into the same tenements," &c. Replication adjudged good, although it showed covin generally. *Hales*, J. said, "that when statutes speak of covin generally, it shall be shown generally, but otherwise of covin at common law." *Tresham's Case* was debt on bond against an administratrix. Plea, debts by recognizances acknowledged, &c., and unpaid. Replication *per fraudem* and adjudged good. The reference to 3 Chitt. Pl., 563, shows a form of a replication *per fraudem* to a plea of release. *Gordon v. Gordon* was covenant, and the case went off, without adjudication, upon a plea of fraud. Chitty (1st vol. on Pl., 553), treating of replications, says that "it is in general unnecessary to state the particulars of fraud." He cites *Tresham's Case* and other cases, which relate, however, to replications *per fraudem*. In *Sherwood v. Johnson*, 1 Wend. R., 443, the Court overruled a demurrer to a replication *per fraudem*, to a plea of judgments outstanding, and C. J. *Savage*, delivering the opinion of the Court, sustains the text of Chitty above cited, and says, "it is sufficient to allege fraud generally." This approval was, however, confined to the particular point before the Court.

From this general view of the question, I am compelled to dissent from the opinion just delivered. In doing so, I feel less reluctance than I otherwise should, from the reflection. that if there be error in the view I have taken, the error is harmless in its operation upon the interests of litigants in this Court.

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*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*C. Fletcher*, for the plaintiffs.

*A. Kinney*, for the defendant.

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[\*182] \*JOHNSON and Another, Assignees, v. BAIRD.

CONTRACT—TENDER.—Action on a promise to pay a certain sum in hats, at a certain time and place. *Held*, that it is a good defense to such an action. that the defendant had, at the time and place, the hats ready to deliver conformably to the contract, but that no person attended to receive them and that he had been always ready, and was still ready, to deliver them at the place on demand (*a*).

ERROR to the *Washington* Circuit Court. The judgment of the Circuit Court, in this case, was affirmed at the last term. See the opinion, ante, p. 153. The defendant in error then filed a petition for a rehearing, and the cause was continued. *The Court*, at the present term, overruled the petition.

STEVENS, J.—I concur in the opinion of the Court; and if it were a case of only ordinary importance, I should let it pass in silence; but as principles of deep interest to the community at large are involved, a few additional remarks may not, perhaps, be improper.

The action in the court below is founded on a promissory note in these words: "One day after date, for value received, I promise to pay to *Jno. H. Farnham*, Esq., fourteen dollars, in fine hats, at my house in *Salem*. March 3d, 1830. *William Baird*." The suit was brought before a justice of the peace, and the defense set up was this: That he the said *Baird* had, at the time and place when and where the note became due and payable, fourteen dollars' worth of fine hats, ready to pay

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(a) See on the subject of tender, 18 Ind., 365; 15 Id., 1; 14 Id., 566; 2 Id., 318; 1 Id., 224, 254; 5 Blackf., 298; 30 Ind., 354; 28 Id., 15; 27 Id., 269; 20 Id., 9, 204; 17 Id., 99, 504, 607; 21 Id., 238, 430; 23 Id., 18; 25 Id., 261; 24 Id., 250; 27 Id., 163; 24 Id., 332, 264; 26 Id., 65.



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and deliver to said *Farnham* in discharge of the note, agreeably to the tenor and effect thereof, but that no person attended to receive them, and that he the said *Baird* had ever since kept the said hats ready at the place aforesaid, and that he still had them there ready to pay and deliver to said *Farnham*, if he would attend and receive them, &c. To this defense the defendant objected, as being insufficient in law; but the defense was admitted. The case was afterwards carried to the Circuit Court by appeal, and that court admitted the same defense, and final judgment was rendered in favour of the defendant. The proceedings were then brought into this court by a writ of error, and the judgment of the Circuit Court is [\*183] affirmed. \*Several errors were assigned, and various exceptions taken, in this court, to the proceedings and judgment of the court below; but my observations are applicable only to the legality and legal effect of the defense set up to the action, that being the only point in the case of any weight or importance.

Contracts for the delivery of specific articles are now, and for more than a century have been, of daily occurrence in both America and Europe; yet, strange as it may be, the rights and duties of parties to such contracts, in some particulars, seem as yet to remain unsettled. Indeed, the most experienced professional men sometimes meet with difficulties in ascertaining the rights and duties of parties, and in forming pleadings adapted to some of the cases that arise. Neither Chitty nor any other writer with whose writings I am acquainted, has even given an intelligible sketch of the different pleadings adapted to actions founded on contracts for the delivery of specific articles; it seems that very little attention has been given to the subject. Chitty has omitted even the form of a plea of tender, and contented himself by saying that a tender must be pleaded specially, and cannot be given in evidence under the general issue. He gives the form of a plea of tender of money, but says nothing about specific articles. The pleadings, however, of a defendant in such cases, must be governed by the same general rules that other pleadings are; and it is said by Chitty

and several other eminent law writers, that a plea by a defendant of tender or readiness to perform, to an action on a contract for the delivery of specific articles, is analagous to the declaration of a plaintiff on contracts for the payment of specific articles, and on contracts founded on executory considerations; and that the same averments which are required to make a good declaration in one case, will, if properly applied, make a good plea for the defendant in the other case. If this position is correct, and I incline to think it must be, it can generally be ascertained what is necessary for a defendant, in an action on a contract for the delivery of specific articles, to state in his plea in discharge of his contract.

It is well settled that, in actions founded on executory considerations, that is, where the consideration of the defendant's promise is something which is stipulated to be done by the plaintiff, or in the case of reciprocal covenants, constituting mutual conditions to be performed at the same time.

[\*184] it is \*sufficient, generally, for the plaintiff to aver a readiness to perform, and that the defendant neglected to attend or to perform his part. As in an action for not delivering goods purchased of the defendant by the plaintiff, an averment that the plaintiff was ready at the time and place to pay the price, is sufficient. Again, it is said by Chitty that it is sufficient for the plaintiff, in alleging an excuse for not performing, to state his readiness to perform the act, but that a performance was rendered unnecessary by the absence of the defendant, or by his failure to perform his part. By applying this rule to the plea of a defendant, it is plainly discovered why several eminent law writers state that, in all cases where a tender and refusal would be a discharge of the contract, a readiness to perform at the time and place is also a discharge.

There is, however, a difference in principle as well as in fact, between a plea of tender and a plea of readiness to perform. When the defendant wishes to discharge himself by a tender, he must show by certain and direct averments, that he had the articles ready at the time and place, and that he tendered them, &c., in performance of his contract, but that the plaintiff

refused to receive them. In this plea the default is thrown upon the plaintiff, by showing that he refused to receive the articles. But when a defendant relies upon the plea of readiness only, he must not only show that he was ready at the time and place, with the articles to pay and deliver to the plaintiff, according to the tenor and effect of his contract, but he must also show that the plaintiff rendered a tender, or any further act on his part, unnecessary, by averring that the plaintiff was absent and did not attend to receive the articles. In this plea the default is thrown on the plaintiff, by showing that he neglected to attend at the proper time and place to receive the articles, and thereby defeated the tender and delivery of the articles agreeably to the contract.

In Bacon's Abridgement, it is said that every consequence which follows a tender and refusal, will follow from being ready to tender, in case the party whose duty it is to be present, neglects to be present; and that if every such consequence did not follow, it would frequently happen, that notwithstanding one party might do all that would be really necessary in justice and honesty to do, yet all would be defeated by the willful absence of the other party.

[\*185] Chipman, in his treatise on the \*subject, lays it down as good law, standing uncontradicted, that if a note of hand be given for the payment of specific articles at a certain time and place, and the maker of the note is ready at the time and place with the articles, to make the payment, and the creditor fails to attend to receive them, it will be a good plea to an action on the note. In the case of *Robins v. Luce*, 4 Mass. R., 474, it is decided that to an action on a written promise to deliver specific articles at a given day and place, it is a good plea in bar that the defendant was ready at the day and place, to deliver the articles to the plaintiff, but he was not there to receive them. The learned Chief Justice, in delivering the opinion of the Court, among other things, said, the defendant had done all he was bound to do, and that it was owing to the plaintiff's own laches that the contract was not performed.

In the case of *Conn v. Gano*, 1 Ohio R., 483, the Court says, that where money is payable at a given day and place, and the defendant is ready at the time and place, with the money to pay, and there is no person there to receive it, that he has done all that was necessary for him to do, and that no action will lie against him for the money, until a subsequent demand is made of him. The Court further says that the right of the plaintiff, in the first instance, does not depend upon a demand; that it is complete by the terms of the contract, and no demand is necessary; but that after he has been guilty of laches, in failing to attend at the time and place of payment, to receive his pay, his right of action is gone, until he makes a demand, if the defendant attended at the time and place to pay him. If this decision respecting the payment of money at a given time and place, is good law, common sense, and justice, as the Supreme Court of the State of *Ohio* says it is, it must most certainly be good law, common sense, and justice, when applied to contracts for the delivery of specific articles at a given time and place. In the case of *Crouche v. Fastolfe*, Sir Thomas Raymond, 418, it is decided that where the payment is to be made at a certain time and place, the defendant may excuse himself by pleading that he was ready to make payment at the time and place appointed, and that no one was there to receive it, and that he has always since been ready, &c., without averring a tender.

Many other cases and dicta may be found in the books which sustain the same principle, but I deem it [\*186] unnecessary to \*pursue the books any further; my opinion is fixed, and I will proceed to state it in as few words as possible.

By natural law and justice, every debtor is excused if he does all that the creditor permits him to do, or all that is necessary for him to do, towards a performance; and the common law permits such debtor to plead the facts in bar of any action brought against him for a non-performance. Hence, in the case of a contract for the delivery of specific articles, at a given time and place, if the debtor has the



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articles at the place on the day, ready to deliver, and the creditor does not attend to receive them, he may plead the facts in bar of an action brought on contract for a non-performance. In such case the debtor may, if he choose, set off the articles for the creditor, by weight, measure, count, or value, according to the contract, and if the creditor do not come to receive them, the debtor may abandon them, and if he do so, he is discharged from all liability or responsibility, and if the articles be lost or damaged, the loss falls on the creditor. But if the debtor should not abandon the articles, but elect to retain them in his own possession, he is bound to keep them safely at his peril for the creditor, and is liable for them if they are damaged or lost; and he is bound to deliver them to the creditor whenever he calls at the place for them. Where money is tendered on a bond for the payment of money, and the person tendering it elects to retain possession of it, he is always accountable for it, and always must have it ready; and when he pleads the tender, he must bring it into court and there have it for the creditor; and just so in the case of specific articles, on a plea of readiness to perform, if the debtor retain possession of the articles, he must show that he has kept them safely, and has always been and still is ready to deliver them, and although he is not bound to bring them into court, yet he must distinctly aver and show where they are, that is, that they are at the place appointed for payment, and that they have always been there ready to be delivered.

The plea of readiness to perform is dictated and sustained by common sense, the common and daily transactions of men, and by the principles of natural justice, and is allowed for the mutual benefit of both parties, and not solely for the benefit of the defendant, as was said in argument; and, therefore,

when the defendant elects to avail himself of such a  
[\*187] defense, and \*retains the articles in his possession,

he is bound at his own peril and risk to keep them safely, and to deliver them to the creditor on his demand;

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and should he neglect or refuse so to do, he is liable in an action of trover and conversion.

It is, however, insisted by the petitioners that it is, in all cases, absolutely necessary that the articles should be set apart and separated from all others by measure, count, weight, or value, agreeably to the debtor's contract, so that they may be distinguished and known; otherwise no action can be maintained by the creditor for them. This position is correct in all cases where the debtor wishes to discharge himself, not only from the contract, but also from all future liability for the articles so set apart. Whenever the defendant delivers the articles at the time and place of payment, and there abandons them and leaves them for the creditor, he must set them off by count, measure, weight, or value, agreeably to his contract, so that the creditor can distinguish and know them, and maintain an action of trover and conversion for them, against any person into whose hands they may fall. But where the debtor elects to keep possession of the articles, he undertakes, at his own peril and risk, to safely keep them for the creditor, and to deliver them to him whenever he demands them of him at the proper place. By his plea he admits the facts so to exist, and acknowledges his duty to safely keep and deliver the articles on demand; he makes the whole a matter of record, by which he is forever bound. He can not afterwards dispute the creditor's title; he never can say that he does not know which articles belong to the creditor; he can not say that the articles are lost or destroyed, or that they are not in his possession. It is therefore sufficient, in a plea like this, to describe the articles as they are described in the contract, for the creditor, in such case, will need no proof in sustaining an action of trover and conversion against the debtor, other than the plea and a subsequent demand and refusal.

In pronouncing this opinion, I well know that I am differing with many whose opinion is far superior to mine; but I sincerely believe it to be founded in correct and clear principles of law, and my duty requires me to express my own, and not the opinion of others. I am also well apprised that this decision

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has but few adjudications, which are directly in point, to sustain it; but, on the other hand, I am authorized to say that [\*188] \*there is, perhaps, no decision directly in point which can be considered as authority contradicting it.

The cases of *Nichols v. Whiting*, 1 Root, 443, and *Barns v. Graham*, 4 Cow., 452, may be thought, by some, to be opposed; but, upon a strict examination, they will be found not to be so. In both those cases the defense set up was clearly unavailable. It was this: That the debtor was ready at the time and place of payment, with the articles, but that there was no one there to receive them. Those pleas both stop here; they do not inform the creditor where his articles are; they do not aver that they set off the articles by weight, count, measure, description, or value, and there left and abandoned them for the creditor; nor do they aver that they retained the articles in their own possession, and had always kept them ready, and still had them ready, at the place, &c. In every point of view those pleas were insufficient.

If, however, we lay aside all precedent and authority, I think the course here taken is dictated and sustained by the principles of sound policy, natural justice, and good reason, and is not only safe, but is conducive to the attainment of justice between men. Principles of good sense and natural justice, adapted to the transactions of men, ought never to be lost sight of in establishing a municipal code. The common law pays a constant regard to them, and permits no rule of decision which invites or favours a violation of those principles; and a very learned judge has said that when principles are strong, it is sufficient that there have been no direct decisions in point to the contrary. This system of pleading in those cases appears to me to be fairly supported by analogy, and is certainly not repugnant to any settled principle of law; by it this branch of pleading and evidence is cleared of contradiction and inconsistency.

I readily admit that the common law adjudications on this subject, as they stood in the days of Coke, are, in some particulars, in apparent confiction not only with some branches of this decision, but also with some branches of most of the modern

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decisions. But that is not a matter of surprise. At that time very few actions were brought on such contracts; personal goods, at that day, were scarcely considered worthy of the attention of the law; the action of trover and conversion by the creditor to recover specific articles of personal goods, after a tender of them in discharge of a contract for the delivery of them, was then unknown.

[\*189] \*Since those days, civil society and the relations, duties, and transactions of men, have undergone an entire change. It is since that period that commercial law has taken its rise, and has been, with such wondrous and beneficial effect, applied to all manner of contracts respecting personal goods; hence, the great changes in the law, rules of pleading, and rules of judicial decision. The great excellence of the common law exists in its flexibility; in its being a science which can always adapt itself to every situation of society, and apply the rules of common sense, sound policy, and natural justice, to the transactions of men.

*J. H. Farnham*, for the plaintiffs.

*I. Howk*, for the defendant.

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DICKSON v. KELSEY, on Appeal.

*DICKSON* and *Kelsey* having bought lands and built mills in partnership, executed a written agreement, stating that *Dickson* had bought *Kelsey's* interest in the mills and lands adjoining them, and was to pay him for the same \$500. In a suit by *Kelsey* against *Dickson* on this agreement, *Dickson* demanded, by way of set-off, a certain sum of money which he alleged he had advanced for *Kelsey*, in building the mills.

*Held*, that *Kelsey* might introduce a witness to prove, in opposition to *Dickson's* demand, that *Dickson* had acknowledged, after the date of the written agreement that the money mentioned in that agreement, was to be over and above the expenses of building the mills (a).

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(a) See *Rockhill v. Spraggs et al.*, 9 Ind., 30.



## SCOTT v. MORTSINGER, in Error.

THE defendant moved that the plaintiff should give security for costs, and founded his motion on an affidavit (under the statute of 1831), that the plaintiff was a non-resident, [\*190] had no \*just cause of action, &c. *Held*, that, on motions of this kind, there should be no examination of witnesses *viva voce*, nor any supplementary or counter affidavits. 1 Arch. Pr., 66; *Lewis v. Brackenridge*, May term, 1821 (1).

(1) So much of the act referred to in the text, as relates to the requiring of security for costs of resident plaintiffs, is repealed. Stat. 1834, p. 171.

## CUMMINS v. BUTLER.

SLANDER—PLEADING.—A declaration in slander stated that the defendant on a certain day, and at divers other days and times, spoke of the plaintiff certain slanderous words. *Held*, that the words “and at divers other days and times,” were surplusage, and not a ground of special demurrer.

SAME.—A count in slander stated, that the defendant had spoken of and concerning the plaintiff these false and slanderous words, viz. *John Butler* (meaning the said plaintiff) swore a lie in the case of *Noah Anderson* against myself (meaning him the said defendant, and referring to a suit previously determined in the *Pike Circuit Court*), and I (the said defendant meaning) can prove it. *Held*, that this was not a sufficient statement that the defendant had charged the plaintiff with perjury (a).

SAME.—If a count charge the defendant with speaking certain actionable words, and also other words not actionable, a demurrer to the whole count cannot be sustained (b).

ERROR to the *Pike Circuit Court*. *Butler* was the plaintiff below, and *Cummins* the defendant.

(a) *Shinloub v. Ammerman*, 7 Ind., 347.

(b) *Wyant v. Smith*, 5 Blackf., 293; *Abrams v. Smith*, 8 Id., 95.

M'KINNEY, J.—This is an action of trespass on the case in slander. The declaration contains one count, in which it is charged, “that the defendant, on the 1st day of *February*, 1829, and at divers other days and times, to wit, &c., spoke and published of and concerning the said plaintiff, these false and scandalous words, to wit: ‘*John Butler* (meaning the said plaintiff) swore a lie in the case of *Noah Anderson* against myself (meaning him the said defendant, and referring to a suit previously determined in the *Pike Circuit Court*), and I (the said defendant meaning) can prove it. He (the said *John* meaning) is perjured, and I (meaning the said defendant) intend to send him to the penitentiary.’” Demurrer to the

declaration, and the following causes assigned: 1, the [\*191] plaintiff alleges a certain day on which \*the defendant spoke the words, and divers days; 2, it is not alleged with sufficient certainty, to what court the defendant referred. in which the lie was sworn. The demurrer was overruled, and a verdict and judgment rendered for the plaintiff.

A number of errors are assigned. They, however, resolve themselves into the proposition of error by the Circuit Court, in overruling the demurrer—1st, because the words are charged to have been spoken at divers other days and times; 2dly, from the insufficiency of the declaration, there being no *colloquium*, and from its containing two charges, the one good, for words of themselves actionable, and the other insufficient, it being for words of themselves not actionable, nor rendered so by proper averments. We will examine the objections in the order in which they are presented.

The declaration alleges that on the 1st day of *February*, 1829, and at divers other days and times, &c., the defendant spoke, &c. This mode of declaring is objected to, from its being inferred that the act charged is laid under a *continuando*. If, on examination, it be found that these words are not within the technical meaning of a *continuando*, and should be treated as surplusage, the objection cannot be sustained. The *continuando* appears to have been peculiarly appropriate to the action of trespass to land, in which the injury may be committed on

## Cummins v. Butler.

several days; and, in such actions, the plaintiff would be precluded from giving evidence of repeated and continued acts of trespass, unless committed during the time laid in his declaration, though he might recover for a single act prior to the first day laid. But as, in general, in actions *ex delicto*, the plaintiff is not confined to the time laid in the declaration, in such actions, with the exception for the specific purpose mentioned, when the act is single in its nature, as in the case of assault, a *continuando* would be improper. 1 Chitt. Pl., 384; 1 Saund. R., 24, n. 1. A distinction is, however, taken, between declaring with a *continuando*, and charging an act to have been committed on divers days and times, between a given day and the institution of the suit; and although trespass for loose chattles cannot be brought with a *continuando*, yet it may in the latter mode of declaring. 2 Salk. R., 638; Bull. N. P., 86.

A greater relaxation of the rule from the distinction taken, applies to the action for an assault, which act being single in its nature, we have seen could not be laid under a [\*192] *continuando*, \*yet may be charged in the latter form.

This was settled in the case of *Burgess v. Freelove*, 2 Bos. & Pull., 425, on special demurrer; and the authority of *Mitchell v. Neale et ux.*, Cowp. Rep., 828, relied on in support of the demurrer as in point, was denied, the above distinction not having been taken; and it was shown that no inconvenience could arise to the defendant, as evidence could only be given of a single act. The case of *Benson v. Swift*, 2 Mass. R., 50, would seem to be in unison with *Burgess v. Freelove*, though the question was not presented in a similar manner.

In the case before us, the application of the rule thus settled would appear to be proper. In slander, to show the existence of malice, the plaintiff is permitted, after giving evidence of the words charged in the declaration, to prove the speaking of other distinct actionable words, both before and after the institution of the suit; and from analogy to assault, and on general principle, each of the acts being single in their nature, we should think that the mode of thus declaring, admissible

in the one, should not be rejected in the other. We think, however, that the words objected to, as they do not amount to the substituted mode of declaring, much less to a *continuando*, must be regarded as surplusage.

As respects the second point, it may be remarked that when words are not actionable *per se*, but are rendered so by reference to some extrinsic matter, it is necessary not only to state that such matter existed, but that the words were spoken of and concerning it; and that in a charge importing perjury, four distinct allegations are necessary in a declaration—1, the fact of an oath being taken in a competent court; 2, a *colloquium* by the defendant of and concerning such oath; 3, the words themselves; and 4, the *innuendo*, that the defendant meant by those words to impute perjury to the plaintiff. The words “he has sworn false,” “he has sworn to a lie,” are not *per se* actionable, and to become so, they must be connected with a judicial proceeding. 1 Chitt. Pl., 382; *Watson v. Hampton*, 2 Bibb, 319; *Vaughan v. Havens*, 8 Johns. R., 109; *Martin v. Melton*, 4 Bibb, 99. To render such words actionable, they must be laid with a *colloquium* of its being in a court of competent jurisdiction, and on a point material to the issue. *Niven v. Munn*, 13 Johns. R., 48. In *M’Claghry v. Wetmore*, 6 Johns. Rep., 82, and in *Watson v. Hampton*, *supra*, [\*193] it is held, that the \*want of a *colloquium* is not cured by an *innuendo*, for that can explain, but not enlarge, the meaning of words, without the aid of a *colloquium*.

The words in the declaration, charged to be spoken, follow the inducement of good character, and omitting a *colloquium*, or any reference whatever to a judicial proceeding, the plaintiff by an *innuendo*, would connect the words with such a proceeding. This, from the authorities cited, and the nature of an *innuendo*, is admissible, as the *innuendo* can only explain matter already expressed, but cannot add to, or enlarge, or change the sense of the previous words. 1 Saund. R., 243, n. 4; 1 Chitt. Pl., 383.

The first set of words in the declaration, being thus unaccompanied by the necessary allegations to render them action-



## Cox v. The State.

able, had the defendant confined his demurrer to that portion of the count, it must have been sustained; but the demurrer is to the whole declaration, and as the succeeding words, constituting a distinct and independent charge, are of themselves actionable, we think the Circuit Court was correct in its judgment; for the law is clear, that when some of the words charged are not actionable, yet if spoken at the same time with words that are actionable, they may all be stated in one count.

*Per Curiam*.—The judgment is affirmed, with five *per cent.* damages and costs.

*J. B. Ray*, for the plaintiff.

*S. Hall*, for the defendant.

## COX v. THE STATE.

NAVIGABLE STREAMS—OBSTRUCTIONS.—The acts of the State Legislature of 1829 and 1831, making it a penal offense to erect or continue any obstructions in certain navigable streams within the State, are constitutional and valid.

SAME.—The public have a right of way in navigable streams within the State, which right cannot be interrupted by the owners of the banks of such streams.

SAME.—Neither the State Legislature, nor Congress, can authorize the erection of obstructions in any navigable stream, within the State (*a*)

SAME—INDICTMENT.—An indictment for obstructing a navigable stream must state the name of the stream, that the part obstructed is navigable. and that the bed has not been surveyed and sold as land by the *United States*: it must, also, state the place where the obstruction is situated, that the passage of boats is obstructed, &c., (*b*).

[\*194] \*ERROR to the *Morgan* Circuit Court.

STEVENS, J.—At the *April* term, 1832, of the *Morgan* Circuit Court, *Cox* was indicted for obstructing the

(a) See *Neaderhouser v. The State*, 28 Ind., 257.

(b) *Wood v. The State*, 5 Ind., 433

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west branch of *White* river. The indictment contains two counts. The first count charges that *Cox*, with force and arms, did erect and keep up a certain mill-dam, in and across the bed of said stream, below the *Delaware* towns; and that said mill-dam so erected is still kept up, and that it destroys the navigation of the stream. The second count charges that the said *Cox*, with force and arms, did erect and keep up a certain other mill-dam, of the height of three feet, across the main channel of the stream, beginning on the west side thereof, and extending up, along, and across the same, about fifty rods, to the upper end of an island, so as to divert, alter, and change the channel of it; and that said mill-dam is calculated to destroy, injure, and obstruct the navigation, said river being a public highway. An issue was joined on the plea of not guilty, which was tried by a jury; a general verdict of guilty found; a fine of five dollars assessed; and final judgment rendered thereon by the Court.

To these proceedings, record, and judgment, several objections are raised—the first of which is, that the west branch of *White* river is one of the navigable waters declared to be common highways, to remain forever free, by the last clause of the 4th article of the ordinance of Congress of the 13th of *July*, 1787; that the bed thereof has not been surveyed and sold as land by the *United States*, but has been returned as one of those navigable streams; that it is not within the legal control or protection of the State of *Indiana*; and that therefore the acts of 1829 and 1831, making it a penal offense against the State to obstruct any of those streams, is unconstitutional and void. To sustain this objection, the ordinance of Congress of the 13th of *July*, 1787, the acts of Congress of the 18th of *May*, 1817, 3d of *March*, 1803, 26th of *March*, 1804, the proviso to the 4th section of the act of the 19th of *April*, 1816, and the ordinance of *Indiana* of the 29th of *June*, 1816, are relied on.

By the latter clause of the said 4th article of said ordinance of Congress of the 13th of *July*, 1787, it is ordained, that the navigable waters of the territory northwest of the river *Ohio*,

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leading into the *Mississippi* and *St. Lawrence*, shall be common highways, and be forever free, as well to the inhabitants of said territory as to the citizens of the *United States*, [\*195] and those of \*other States that may be admitted into the confederacy, without any tax, impost, or duty therefor. The acts of Congress of the 18th of *May*, 1817, 3d of *March*, 1803, and 26th of *March*, 1804, establish that the navigable rivers and streams, through the domain of the *United States*, shall be and remain public highways; and that streams not navigable, having the opposite banks owned by different persons, shall have their beds and waters common to both. The act of Congress of the 19th of *April*, 1816, is the act enabling the people of the *Indiana Territory* to form a constitution and State government, and the proviso to the 4th section declares, that the articles of the ordinance of the 13th of *July*, 1787, are irrevocable, and that the constitution and State government of the Territory, when formed, should not be repugnant to those articles; and the ordinance of *Indiana* of the 29th of *June*, 1816, accepts the propositions and conditions of that act of Congress.

The State, by her statute of the 23d of *January*, 1829, and the 42d section of the statute respecting crime and punishment, of the 10th of *February*, 1831, has enacted that any person or persons, who shall erect and keep up, maintain, or continue, or who may have erected and shall continue to keep up any mill-dam, or other artificial obstruction in or across the bed or channel of any navigable stream or river, and the bed or channel thereof has not been surveyed and sold as land by the *United States*, shall, upon conviction by indictment, be fined in any sum not less than three dollars nor more than \$500, for each week any such dam or artificial obstruction may have been kept up, maintained, or continued. This indictment is bottomed on those statutory provisions of the State, and if they are unconstitutional, the indictment and proceedings thereon must all fall. We do not, however, think they are unconstitutional. The several States of the *Union* are confederated together for national purposes, yet they are in all

other respects independent sovereignties. They retain their individual sovereignty, and with respect to their municipal regulations, are sovereign in every sense of the word, and independent of each other, and of the federal government, except so far as those sovereign rights and powers may have been surrendered or abridged, by the federal constitution, or by compact. They are not excluded from the exercise of any power belonging to free and independent sovereignty, except in

three cases; 1, where a power is granted in exclusive [\*196] \*terms to the general government; 2, where the

States are in express terms prohibited from the exercise of any power; and 3, where a power is granted to the general government, the contemporaneous exercise of which by the States would be incompatible. These State enactments, now under consideration, cannot fall under either of those heads. The State has not passed her legal constitutional limits and infringed the rights of either her own citizens, or the rights of the citizens of other States; nor has she brought herself in collision with any act of congress, or with the judicial powers of the *United States*.

The general government has no right in, or control or jurisdiction over those streams within this State. It has disposed of all the right, control, and jurisdiction it ever had, without any reservation. It is true that the legal title still vests in the *United States*; but the possession, use, occupation, and jurisdiction have been surrendered. The possession, use, and occupation, have been granted to the citizens of the several States and territories of the *Union*, and the *United States* stand seized, to their and each of their use and benefit, for the purposes contained in the grant. The States severally, as States, have no right or property in them; but this State has jurisdiction over them, and over all persons navigating them, within the limits of the State, for all municipal purposes and regulations, except that she is prohibited by compact, from the right of converting them to any other use than public highways, and from obstructing them with any artificial



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obstruction, and from levying any tax, impost, or duty on any of those citizens who may navigate them.

The *United States*' constitution gives the general government power "to regulate commerce with foreign nations, and among the several States," and the counsel for the plaintiff in error insists, that under that power the general government has the right to legislate over all navigable streams, and that those State enactments come in conflict with that power. We shall not at this time examine how far the general government, by legislative acts of congress passed for the purpose of regulating commerce, could control State legislation over those streams; it is enough to know that no such acts have been passed. Let this power be what it may, when properly exerted by acts of congress passed to regulate commerce, yet while it lies dormant,

and is not so exerted, it cannot control and restrain  
[\*197] \*State legislation. And even if the *United States* had so exerted this power, it would only control and restrain such State enactments, as would conflict with the congressional statutes. These principles were settled in the Supreme Court of the *United States*, in the case of *Willson et al. v. The Blackbird Creek Marsh Company*, 2 Pet. Rep., 245. It appears rather strange, that it should be contended that the power and supremacy of the legislature to legislate for general and public purposes, and for the promotion of public good, should be called in question, unless there were some express constitutional prohibition. To oust the State of its sovereign right to legislate for the protection of those streams, by punishing persons obstructing them, and removing obstructions when necessary, it must be expressly shown that that power has been expressly surrendered by treaty, grant, or compact, or that it is in conflict with some prohibitory provision of the constitution of the *United States*, or that its exercise is incompatible with some jurisdiction of the *United States*, which they are in the immediate exercise of, and which has been granted to that government.

It is further insisted by the counsel for the plaintiff in error, that inasmuch as the *United States* have not surveyed and sold

the bed of this stream as land, it still belongs to the *United States*, and stands on the same foot that the other unsold lands stand on, and that the State has no power to legislate over these public lands. To sustain this point, the case of *The People v. Godfrey*, 17 Johns. Rep., 225, is relied on. This position is not tenable: the premises from which the conclusion is drawn, are not correct. The bed of this stream does not stand on the same foot of the *United States'* unsold lands; there is no analogy whatever between them. The bed of this stream has been irrevocably disposed of, for express and certain uses and purposes, and cannot be sold by the *United States*. And as to the case of *The People v. Godfrey*, it is not in point. The question in that case was, whether the ground on which fort *Niagara* stood had been sold and conveyed to the *United States*? The federal constitution gives to congress "exclusive legislation over all places, purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other useful buildings;" and the difficulty in that case arose, in consequence of there being no legal evidence of the conveyance having been made.

[\*198] \*The next point presented for the consideration of the Court is, that *Cox* being the owner of the banks of the river, is by the common law, the owner of the river, and has a right to occupy and use it, in any way or manner he pleases, for his own benefit. In support of this position, reference is made to *Hale's* treatise *De Jure Maris*, and the case of *The People v. Platt*, 17 Johns. Rep., 195. We have carefully examined those authorities, and think they do not establish the principle contended for. The case of *The People v. Platt*, is not, as to matters of fact, in point. In that case the river had been surveyed and sold as land; there was no reservation or deduction of the bed of the stream; the whole was computed as land, and sold as so many acres; the lines of the survey crossed the river, and the government patent covered the whole survey, including the river. The stream in every sense of the word was private property, not only in proprietary

and ownership, but also in use, and not a common passage for the public. The Court, however, took a general view of the common law rights of bank proprietors, but we find nothing in it that sustains the plaintiff in error in this case. As to the treatise of Sir Matthew Hale *De Jure Maris*, we can only say, that in that treatise the learning concerning public property in the sea and rivers is exhausted, and that all the common law on the subject is collected, but we cannot preceive that it sustains the plaintiff in error in this case. At common law there are two classes of navigable streams; 1, navigable streams in which the tide ebbs and flows; on these, the rights of the bank owners extend only to high water mark. The bank below high-water mark, and the whole bed of the stream, belong exclusively to the public. 2, navigable streams where the tide does not ebb and flow; on these, the bank proprietors have right and title to the centre of the stream, as they have in the soil on which a public highway on land runs, but the public have a right of way in the stream, as they have in a public highway on land, and the bank proprietors cannot interfere with that right of way, nor can they obstruct the stream, or divert it from its use as a public highway, nor can they make any use of it inconsistent with the public right of way. Hale, in his 2d and 3d chapters, in reference to the government's interest of jurisdiction, establishes the principle in direct language, that the government's jurisdiction [\*199] over those streams in reference to \*nuisances is, to reform and punish nuisances in all navigable rivers, whether fresh or salt, and reform all obstructions to the common passage of ships, vessels, barges, or boats therein; for as common highways on the land are of the common land passage, so these rivers, whether fresh or salt, that bear boats, are highways by water. But, says he, this jurisdiction is not in reference to the proprietary of the river, but to the public use, and therefore all nuisances and impediments of the passage of boats and vessels may be punished by indictment and removed. The doctrines of the civil law were more uniform, and the rights of all riparian proprietors were the same, as it respected the

ownership of navigable streams. There was no difference made between those navigable streams where the tide did not ebb and flow, and those where it did. The exclusive right of the owner of the bank extended only to high water mark, and the bank below high water mark, and the whole bed of the stream, belonged exclusively to the public, and no obstruction or diversion of the water was permitted. The principles of the common law have been recognized in eight or ten of the States, but in several others the principles of the civil law, to a very considerable extent, have been adopted. In this State, neither the principles of the common or civil law have, as yet, received any judicial sanction. The case now before us does not require us to pursue those easements and aquatic rights any further. The ordinance and statutes of congress referred to in the fore part of this case, as well as both the common and civil law, settle this point beyond a doubt against the plaintiff in error.

The next objection raised is to the opinion of the court below, declaring a certain statute of the State unconstitutional and void. The legislature of the State, by their act of the 13th of *January*, 1826, authorized *Cox*, the defendant below, to erect a mill-dam across the west branch of *White* river at the place in question; and the record shows that, on the trial of the issue before the jury, that was offered in evidence to show that the defendant had a legal right to erect the mill-dam in question; but the court rejected it, declaring it unconstitutional and void. The counsel for the plaintiff in error insists that if the State has power to legislate over that stream for any purpose, it has for all purposes; that if the acts making it a penal offense to obstruct the stream, are constitutional, the act author-  
[\*200] izing the \*erection of the mill-dam is also constitutional. The objection needs no examination. The investigation of the first point raised in this case satisfactorily develops that this position is not tenable. The act now in question is clearly unconstitutional and void. The ordinance of congress of the 13th of *July*, 1787, which is made perpetual and irrevocable between this State and the *United States* by the act of congress of the 19th of *April*, 1816, and the ordinance



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of *Indiana* of the 29th of *June*, 1816, puts it out of the constitutional power of either the State, or the *United States*, to authorize such an obstruction.

The next error assigned is that the indictment is defective, and not sufficient in law to authorize the rendition of a judgment of guilty. This error is well assigned; both counts of the indictment are materially defective. Indictments for obstructing navigable streams must contain direct averments, distinctly stating the name of the river, and that so much of it as runs through and is situate in the county in which it is obstructed, is navigable, and a common and public highway for all citizens, &c., to pass, repass, and navigate with their boats and vessels; &c., at their will and pleasure, without any artificial hindrance, impediment or obstruction, &c. (*to which, under our statute, must be added, that "the bed or channel of which has not been surveyed and sold as land by the United States"*), the place where the obstruction is situated, &c., and that the matter complained of does hinder, impede, obstruct, &c., the passage of boats and vessels, &c. Many of these material averments are omitted in the indictment now under consideration, which renders it clearly defective.

There is also an objection raised to the verdict, but we think it useless to examine that question, as it involves no important abstract legal principle. We have gone over all the material and important points raised in the case, and have finally come to the conclusion that the indictment is insufficient in law, and that the judgment of the Circuit Court must be reversed.

*Per Curiam*.—The judgment is reversed.

*H. Gregg*, for the plaintiff.

*P. Sweetser*, for the State.

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Aldridge v. Burlison and Wife.

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## [\*201]      \*ALDRIDGE v. BURLISON and WIFE.

HUSBAND AND WIFE—CONVEYANCE.—A feme covert may, by statute, join with her husband in the execution of a conveyance of real estate; but she cannot be bound by any of the covenants contained in the conveyance (a).

ERROR to the *Posey* Circuit Court.

BLACKFORD, J.—*Aldridge* brought an action of covenant against *Burlison* and his wife. The declaration avers that *Burlison* and his wife by an indenture, in consideration of \$200, gave, granted, bargained, and sold unto *Aldridge* certain real estate; and covenanted with him that they were lawfully seized in fee of the premises, and had good right to sell and convey the same to him. The declaration also avers, that *Burlison* and his wife were not lawfully seized in fee of the premises or of any part thereof, and that they had not any right whatever to convey the premises to *Aldridge*; but that, on the contrary, *A. & J. M'Faddin* were lawfully seized in fee of the premises, who had the exclusive right to sell and convey them. It also avers, that *A. & J. M'Faddin* had and still have lawful right to, and possession of the premises; and that they have, from thence hitherto, kept out and still do keep out *Aldridge* from the possession, contrary to the covenant of *Burlison* and his wife.

The defendants pleaded two pleas; 1st, *actio non*, because the defendants were, on, &c., lawfully seized, &c.; and that *A. & J. M'Faddin* were not, at, &c., lawfully seized, &c.; 2d, that the action ought not to be further maintained, because *A. & J. M'Faddin*, since the last continuance, have relinquished their title to the defendants. Replication to the first plea, and issue. Demurrer to the second plea, and judgment on the demurrer for the defendants.

Although the second plea be considered bad, as contended for by the plaintiff, still the judgment of the Circuit Court

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(a) The joining by a married woman with her husband in the covenants contained in a deed of land does not convey or release her dower. *Davis et al. v. Bartholomew*, 3 Ind., 485

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against him is correct. The declaration is substantially defective. The action is against a husband and his wife, founded on a personal covenant averred to have been made by them jointly. Such an action cannot be sustained. A feme [\*202] covert can enter \*into no such covenant. She may, by virtue of our statute, join with her husband in the execution of a conveyance of real estate; but she cannot join with him in any of the covenants contained in the deed. The action here is against two persons on a joint covenant, which covenant, as shown by the declaration, is not binding on one of the defendants. The declaration is, therefore, bad on general demurrer. 1 Chitt. Pl., 32 (1).

*Per Curiam*.—The judgment is affirmed with costs.

*R. Crawford*, for the plaintiff.

*C. I. Battell*, for the defendants.

(1) The following case is in point: *Wadleigh* sued *Glines* and *Polly* his wife in covenant. The declaration alleged that the defendants conveyed to the plaintiff a certain tract of land, which they claimed in right of the said *Polly*; that the defendants, by the said deed, covenanted with the plaintiff that they were lawful owners of the premises, &c., that they would warrant. &c. Breach, &c. Demurrer to the declaration and judgment for the defendants.

*Per Curiam*.—"It is well settled, that upon a mere personal contract, made by a wife, during the coverture, she can in no case be sued. 16 Johns., 281. *Edwards v. Davis*; 17 ditto, 167, *Jackson v. Vanderheyden*; 15 ditto, 483, *Whitbeck v. Cook*; 1 Binn., 575; 1 Chitt. Pl., 43.

"But, at common law, covenant on a warranty in a fine, or on a covenant, running with the land of the wife, demised by her during the coverture, might be supported against her. 1 Chitt. Pl., 43; 3 Saund., 177, *Wotton v. Hele*; Ibid, 180, note 9.

"In this State a married woman may, by joining with her husband in a deed, convey her lands; and her deed, thus made, will estop her and her heirs from setting up, against the grantee, any title she may have had when the deed was made.

"But she has never been considered as bound by any covenant of warranty in the deed. 7 Mass. Rep., 291, *Colcord v. Swan et ux.*

"Nor is she estopped, by such a covenant, from setting up a subsequently acquired title. 17 Johns., 167;" *Wadleigh v. Glines et ux.*, 6 N. Hamp., 17.

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Christianberry v. Christianberry.

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## CHRISTIANBERRY v. CHRISTIANBERRY.

DIVORCE.—If a man apply for a divorce on account of the adultery of his wife, and it be proved that after the offense complained of, he himself lived in adultery with another woman, his application must fail.

SAME—ADULTERY.—*Semble*, that a petition for a divorce on account of adultery, should state the time and place when and where the offense was committed (a).

[\*203] \*ERROR to the *Rush* Circuit Court.

M'KINNEY, J.—This is a petition filed by the plaintiff in error, in the *Rush* Circuit Court, to obtain a divorce on a charge of adultery and voluntary abandonment. The petition states that the parties have been married twenty-seven years, and charges that the defendant was guilty of adultery, and had, eight years ago, left the plaintiff voluntarily, with the intention of abandonment, and has continued separate since. It is further alleged that the petitioner has resided in this State four years. The Circuit Court dismissed the petition, and rendered judgment in favour of the defendant for costs.

The testimony on which the judgment was founded is presented by the record. It appears that the parties resided in the State of *Tennessee*, and that eight years since the defendant left the plaintiff, who had endeavored in vain to induce her to return to him; that it was generally understood that the defendant lived in adultery; that since the plaintiff came to this State he has lived with a woman who has children, supposed to be his, and that nothing was alleged against him until the departure and adultery of his wife.

The statute regulating divorces designates particular causes for which they may be granted; among these is adultery, or where either party has left the other, with the intention of abandonment, for the space of two years; and further gives authority to the Circuit Court to grant them when, in its discretion, it may be considered reasonable and proper. We can not admit, as was contended, that proof of voluntary abandonment, of adultery, or of any of the other causes designated,

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(a) See *Armstrong v. Armstrong*, 27 Ind., 186.



would, unconnected with acts of the opposite party, render it imperative on the Circuit Courts to grant a divorce. Such a construction of the act would not only conflict with the legislative intendment, and oppose settled principles of law, but would afford an inducement to all disposed for a change of the relation to enforce the extension of its benefit by a course of conduct from which the result intended must necessarily flow. Legislation contemplates the prevention of wrong, but never invites to its commission. The wronged and injured are the objects of its protection; its sanctions await offenders. If the construction contended for were admitted or warranted, cruel treatment or corrupting example, bringing a party within the act, would enable him to take advantage of a wrong.

[\*204] This \*would be in opposition to the settled law. We think that so far from proof alone of the causes specified, entitling the plaintiff to a divorce, he should, not only at the time the offense charged was committed, but at the time of the application for relief, have presented himself, if not unoffending, at least unobnoxious to the penal laws of the State. Suppose the abandonment charged was caused by the conduct of the plaintiff, surely proof of the fact would defeat the application for relief. In the case of *Williamson v. Williamson*, 1 Johns. Ch. R., 488, the law is regarded to be settled that, in adultery, the reception by the injured party of the offender, lapse of time, or long acquiescence without any disability to sue, is a bar to a prosecution for a divorce. Although the testimony before us is extremely vague, it may yet be inferred, if any part is properly applicable to the charge of adultery, that the commission of that offense by the defendant was known to the plaintiff, when he endeavored to induce her to return to him. Such an effort made, with a knowledge of the fact, was a waiver of any right to relief.

The petition charges the defendant with the crime of adultery. The charge is as vague and indefinite as it could be presented. In *Codd v. Codd*, 2 Johns. Ch. R., 224, it is said, "that adultery should be specifically charged, as to time, place or person, so as to enable the defendant to meet the accusation."

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Christianberry v. Christianberry.

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In this case, the parties were married twenty-seven years ago, and in so serious a charge, the responsibility of sustaining her character during so long a period, is thrown upon her, if so general a charge could be regarded as sufficient. Some modification of the rule laid down in *Codd v. Codd*, is, however, presented in *Germond v. Germond*, 6 Johns. Ch. R., 347, in which the Chancellor, after reviewing the cases upon the point, comes to the conclusion, "that the better opinion is, that a charge of adultery need not specify the names of the persons with whom it was committed, and certainly it cannot and need not be required, if the persons are unknown when the bill is filed." Yet, it would seem, that time and place should be specifically charged. A general charge must produce surprise and inability on the part of the most vigilant, to make the necessary preparation for defense. The testimony on this point is as broad as the charge. One witness states, that it was generally understood in the neighborhood, that the defendant lived in adultery. Another says, he heard nothing [\*205] against the plaintiff before the \*departure and adultery of the defendant. The record shows the defendant to be a non-resident, and the witnesses are on the part of the plaintiff. Yet, to what does this testimony amount? Clearly, not to legal proof of the defendant's guilt.

From these witnesses it also appears that the plaintiff, since he has lived in the State, has lived with a woman who has had children they suppose to be his. He then, thus living in adultery, is neither unoffending nor irresponsible to the violated laws of the State, and cannot be the subject of the relief asked.

We are therefore of opinion, that the Circuit Court was correct in dismissing the petition, and rendering judgment in favour of the defendant for costs (1).

*Per Curiam*.—The judgment is affirmed with costs.

*M. M. Ray*, for the plaintiff.

*H. Gregg*, for the defendant.

(1) See Statute 1833, p. 32, supplementary to the act in Rev. Code of 1831, respecting divorces.

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Hubble v. Hubble.

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## HUBBLE v. HUBBLE.

WITN SS.—If in an action of debt or assumpsit commenced before a justice of the peace, the cause of action be denied by plea, the plaintiff may on the trial, either before the justice or on appeal, examine the defendant under oath as a witness; but the defendant is not bound, unless when thus under oath, to answer any questions in the cause.

ERROR to the *Fayette* Circuit Court.

STEVENS, J.—This was an action of assumpsit brought before a justice of the peace, upon an account in writing, consisting of fifty or sixty items. The defendant pleaded two several pleas in bar; 1st, non-assumpsit; 2d, payment. The case was tried by a justice of the peace, and judgment given for the plaintiff. An appeal was then taken to the Circuit Court, a trial by jury had, and a verdict and judgment rendered for the plaintiff.

Several objections have been raised in this Court, tending to show that the judgment of the Circuit Court ought to be reversed; but we think it only necessary to examine one of these objections.

[\*206] \*It appears of record by a bill of exceptions, that after the jury was impaneled and sworn in the Circuit Court, the plaintiff called upon the defendant to admit or deny the plaintiff's account, item by item, severally, as the plaintiff might read them to him; to the doing of which the defendant objected, unless he were first sworn as a witness; but the Court overruled the objection and required him to answer, without being sworn as a witness, and to admit or deny the several items of the plaintiff's account, severally, as the plaintiff might read them to him. The plaintiff contends that the 35th section of the act of 1831, regulating the jurisdiction and duties of justices of the peace, authorized him to interrogate and require the defendant to answer, as was in this case done, without his being sworn as a witness.

To come to a satisfactory understanding of this question, it is perhaps necessary to travel behind the statute, and see how

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the case would have stood, had that section never been enacted. The defendant had pleaded two pleas in bar; 1st, non-assumpsit, and 2d, payment, before the justice of the peace. These pleas stood in the Circuit Court as they did before the justice, and had to be again tried; and for that purpose the jury was impaneled and sworn.

The first plea is an absolute denial of the demand, the account, and every item in it; and the plaintiff could not recover, unless he could prove his cause of action, by legal and disinterested evidence. He could neither interrogate the defendant as to his account, or any of its items, nor could he swear him as a witness, if there were no statute authorizing it. From this view of the case, the question at once presents itself; What alteration has the statute made? What object had the legislature in view?

The 35th section of the act of 1831, regulating the jurisdiction and duties of justices of the peace, enacts, that "in all trials in actions of debt or assumpsit before any justice, it shall be lawful for the plaintiff, if the defendant deny the debt, demand, or account, to require such defendant to answer on oath or affirmation to such charge; and if thereupon the defendant deny the same, the plaintiff shall not have judgment, unless he establish his claim by legal evidence." This language is plain and simple, and seems to apply itself to the state of the issues made by the parties. The obvious [\*207] purpose seems to be, simply to \*give to the plaintiff, under an issue denying the demand, one more witness than he would have at common law. It authorizes the defendant to be made a witness, if he deny the demand. The meaning and intention are clearly obvious.

If the defendant confess the demand, the plaintiff needs no witness; he takes judgment on the confession. Or if the defendant pleads, confessing the demand, but avoids it by matter set up in bar, as payments, fraud, want of consideration, &c., the plaintiff has nothing to prove; he needs no witness. But if the defendant deny the demand by pleading non-assumpsit, nil debet, or other proper plea, the plaintiff can not recover,



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unless he establish his claim by legal evidence; in such case, the statute authorizes him to make a witness of the defendant. Here the statute comes to his aid, and gives him a witness which he has not at common law. He is not bound to make a witness of the defendant unless he pleases; if he decline so doing, he stands precisely as he would have stood if the statute had never been enacted. The statute takes nothing from him; it only gives him an additional witness, if he desire to use him.

We think the denial, by plea, of the claim, is all the denial the statute contemplates, and that no disinterested mind can ever give it any other construction.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*J. Rariden*, for the plaintiff.

*O. H. Smith*, for the defendant.

## ELDRIDGE v. FOLWELL and Another.

**WARRANT OF ATTORNEY**.—A warrant of attorney to confess judgment can not be expressly revoked (*a*).

**SAME**.—A warrant of attorney authorized the confession of judgment at a certain term, for a certain sum, in an action of debt, and the judgment was confessed accordingly. *Held*, that the judgment was not erroneous, merely because the nature of the debt was not particularly described in the warrant (*b*).

(*a*) A married woman can not bind herself by a warrant of attorney to confess a judgment. *Patton et ux. v. Stewart*, 19 Ind., 233.

A power of attorney to confess a judgment is not revocable by act of the party giving it. See *Kindly v. March*, 15 Ind., 248.

(*b*) A judgment by confession may be corrected on complaint filed, as in other cases. See *Kindly v. March*, 15 Ind., 248.

A warrant of attorney to "enter" judgment authorizes the attorney to confess judgment. See *Mason v. Smith*, 8 Ind., 73.

When a warrant of attorney authorizes *A*, or any other attorney of the court in which the judgment is to be confessed, to appear and confess a judgment, and *A* and *B*, another attorney of said court, appear and confess the judgment, the same will be valid. *Patton et ux. v. Stewart*, 19 Ind., 233.

A warrant of attorney to confess a judgment must be supported by an affidavit that the debt is just and owing, and that the confession is not made for the purpose of defrauding creditors. See *McPheeters et al. v. Campbell*, 5 Ind., 107; 12 Ind., 551.

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**APPEARANCE.**—The defendant's appearance to the action, by attorney, prevents him from making any objection relative to the process (c).

[\*208] \*ERROR to the *Cass* Circuit Court.

**BLACKFORD, J.**—On the 23d of *October*, 1832, the second day of the *October* term, a declaration was filed by *T. & R. Folwell* against *Eldridge*, in the *Cass* Circuit Court, in an action of debt. The cause of action described in the declaration is a note given by *Eldridge* to *T. & R. Folwell* for \$382, dated the 14th of *July*, 1832, and payable the 20th of *October* following, with interest from the date. On the day on which the declaration was filed, two attorneys, by virtue of a warrant of attorney, entered *Eldridge's* appearance to the action, and confessed a judgment for \$387.73.

On the day the judgment was confessed, and previously to the confession, *Eldridge* delivered to the court, and to the attorneys to whom the warrant was directed, a formal revocation of the warrant, dated the 22d of *October*, 1832.

The objections made by *Eldridge* to the judgment in this case are: 1st, that the warrant of attorney was revoked; 2d, that it was insufficient; 3d, that there was no writ.

There is nothing in the first objection. The rule is well established that a warrant of attorney to confess a judgment can not be expressly revoked. *Odes v. Woodward*, 2 *Ld. Raymond*, 849, 850; 2 *Arch. Pr.*, 21; 2 *Kent's Comm.*, 646.

The second objection is untenable. The warrant authorizes certain attorneys to confess a judgment for *Eldridge* in favour

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Under sec. 59, 2 G. & H., 592, judgment by confession may be impeached for fraud by creditors of the judgment debtor, and no distinction is made between subsequent creditors, and those existing at the time of the rendition of the judgment. *Feaster v. Woodjill*, 23 *Ind.*, 493

(c, A voluntary appearance, in full to a cause, waives defects in process and publication. 13 *Ind.*, 490; 10 *Id.*, 380. *Free et. al. v. Haworth*, 19 *Id.*, 404. It is equivalent to service of process. *Albertson v. Williams*, 23 *Id.*, 612. That a general appearance, after a discontinuance, waives it. See *McDougle et al. v. Gates et al.*, 21 *Ind.*, 65; 4 *Id.*, 268.

Voluntary appearance gives jurisdiction of the person. 14 *Ind.*, 480. As to a party being relieved from a judgment rendered against him where the attorney appeared without authority, &c. See *Floyd County, &c., v. Tompkins*, 23 *Ind.*, 348; *Wiley v. Pratt*, 23 *Id.*, 628.

A party may enter a special appearance, and move to set aside defective process, and will not thereby waive the right to object to such defects. *Campbell v. Swasey*, 12 *Ind.*, 70. See 8 *Ind.*, 194; 7 *Id.*, 447; 13 *Id.*, 490.

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of *T. & R. Folwell*, at the *October* term, 1832, for a certain sum, in an action of debt. The judgment was accordingly confessed at the proper term, for the correct amount, and in the proper kind of action. It is true the nature of the debt is not particularly described in the warrant; nor was it necessary that it should be. There is nothing in the record to show us that the judgment was not confessed for the proper cause of action.

The third objection is equally groundless. The defendant's appearance to the action, by his attorneys, prevents him from making any objection relative to the process.

*Per Curiam*.—The judgment is affirmed, with costs.

*J. Rariden*, for the plaintiff.

*C. W. Ewing*, for the defendants.

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## [\*209]      \*THE STATE v. BAILEY and Another.

**CRIMINAL LAW—PRACTICE.**—Indictment against eight persons for an *unlawful assembly*. Five of the defendants appeared and pleaded not guilty and two of these five were found guilty and three not guilty. *Held*, that judgment should be entered against the two found guilty; but that they must have been discharged, had all the others indicted been tried and acquitted.

ERROR to the *Johnson* Circuit Court.

M'KINNEY, J.—Indictment for an unlawful assembly. Eight persons are charged by the indictment to have been guilty of the offense, of whom five pleaded not guilty. A jury found two of these guilty as charged, and acquitted the other three. A motion, made by the defendants found guilty, to arrest the judgment, was sustained, and they were discharged.

The only question presented for our consideration is, should the judgment have been arrested? The principle is well settled that when an offense can only be committed by a certain number of persons, the number required to constitute it must

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be indicted, to justify a conviction. Thus, an unlawful assembly, a rout, or a riot, cannot be committed by less than three persons, nor a conspiracy by less than two. If, in either of these offenses, a less number than is required to constitute it be not indicted, or if, on trial, less than that number be found guilty, and the others charged be acquitted, the conviction could not be sustained, as the specific offense would not appear to have been committed. 1 Chitt. Cr. L., 223; Com. Dig. Information, D., 7.

But in the offenses referred to, and in others requiring a certain number to their constitution, if a less number be charged with others unknown, or with many others, a conviction would be valid, though they never come in to be tried, or die before the time of trial. 1 Chitt. Cr. Law, 523; 2 Hawk. Pl. Cr. ch. 47, s. 8, n. 1, p. 441. Thus, in the case of *Rex v. Nicolls*, 2 Str. R., 1227, on an indictment for a conspiracy against two, one was convicted after the death of the other, and the conviction was adjudged good. In *Rex v. Kinnersley & Moore*, 1 Str. R., 193, on an indictment for a riot, four were indicted, two found guilty, and two acquitted. The judgment was arrested, and it

was said that "it would have been different if the two [\*210] found \*guilty had been charged *cum multis aliis*."

And in *Rex v. Scott & Hams*, 3 Burr. R., 1262, six were indicted for a riot, two were convicted, two acquitted, and two died before the trial. The conviction was sustained, and Lord *Mansfield* remarked, "The jury have found these two guilty of a riot, consequently it must have been together with those who have never been tried, as it could not otherwise be a riot."

In the case before us, eight are indicted, and two of five, pleading not guilty, are found by a jury to be guilty as charged, and the other three thus pleading acquitted. The three others indicted appear not to have been before the court, and, clearly, the jury may have well found the two convicted to have been guilty with the other defendants not tried. The verdict of the jury was not only warranted by the principles adverted to, but in conformity to the adjudications cited.



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We are therefore of opinion that the motion to arrest the judgment should have been overruled, and that judgment should have been rendered on the verdict.

*Per Curiam.*—The judgment is reversed, with costs. Cause remanded, &c.

*H. Gregg*, for the State.

*H. Brown*, for the defendants.

## TURPIN v. REMY.

**MALICIOUS PROSECUTION—EVIDENCE.**—In an action for maliciously prosecuting the plaintiff for a criminal offense, the affidavit on which the warrant for the arrest issued is admissible evidence for the plaintiff, if it authorized the warrant.

**SAME—PLEADING.**—The declaration in such a case need not aver that the charge was made under oath; but it ought to state the offense for which the plaintiff was prosecuted, by the name or description given to it by law (a).

**SAME—PRACTICE.**—A defendant can not ask the court, under the statute, to instruct the jury to disregard a count in the declaration on account of its being defective, if the defect would be cured by a general verdict for the plaintiff.

**SAME.**—An action of malicious prosecution can only be supported, in cases where the prosecution was under the regular process and proceedings of some judicial officer or tribunal: if the proceedings complained of were extra-judicial, the remedy is trespass.

[\*211] \*ERROR to the *Marion* Circuit Court.

STEVENS, J.—*Remy* declared against *Turpin*, in the *Marion* Circuit Court, in an action on the case for a malicious prosecution. The declaration contains two counts. The first count alleges that *Turpin* falsely, &c., in the county of *Boone* in this State, before one *John M. Bay*, a justice of the peace of said county of *Boone*, charged *Remy* with having sworn false, with respect to a certain piece of counterfeit money,

(a) See *Bartlett v. Jennison*, 6 Blackf., 295; *Steel v. Williams*, 18 Ind., 161; *Stanciff v. Palmer* Id., 321.

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which *Remy* sometime before swore before the same justice of the peace, that he, said *Remy*, received of and from the said *Turpin*, and, upon such charge, falsely, &c., procured the said justice of the peace to issue his warrant, &c. The second count alleges, that the said *Turpin* further contriving and maliciously intending, &c., at the aforesaid county of *Boone*, charged the said *Remy* with having sworn false, and upon that charge falsely, &c., procured said *Remy* to be arrested by his body and imprisoned, &c., for seven days, &c., at the expiration of which time he, the said *Remy*, was duly discharged, &c. The defendant pleaded a general plea of not guilty to the whole declaration, upon which issue was joined. That issue was tried by a jury, who found a general verdict for the plaintiff and assessed entire damages. Motions were made by the defendant in arrest of judgment and for a new trial, which were severally overruled and final judgment rendered.

It appears of record by a bill of exceptions, that the defendant moved the Court separately, on each count of the declaration, to charge the jury that it was "faulty," and should be disregarded; but those motions were severally overruled. The affidavit charging *Remy* with having sworn false, and the warrant of the justice of the peace which issued thereon, and which are mentioned in the first count of the declaration, are also spread upon the record by a bill of exceptions; and it further appears by the bill, that both the affidavit and warrant were objected to by the defendant as evidence in the cause, but that the objections were overruled.

The plaintiff in error contends, that this affidavit charging *Remy* with having sworn falsely, which is mentioned in the first count of the declaration, and upon which the warrant of the justice of the peace issued, contains no charge of any criminal offense, and is, therefore, insufficient to support an action for a malicious prosecution. This affidavit is [\*212] not very aptly drawn, \*nor does it, in technical law language, contain a legal description of the crime of perjury; but yet it contains a sufficiency to authorize the justice of the peace to issue his warrant. It states, among

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other things, that *Remy* did swear false with respect to a certain counterfeit piece of money, which the said *Remy* swore before the said *John M. Bay*, the above-named justice of the peace, he did sometime before receive of the said *Turpin*, &c. We have two distinct enactments respecting perjury. The first is respecting oaths in judicial proceedings, and other matters in which an oath is required by law. The other is respecting voluntary oaths. It enacts that any person who shall willfully, corruptly, and falsely, before any justice of the peace, &c., under oath, &c., make any false certificate, affidavit, or statement, of any nature, for any purpose whatever, shall be deemed guilty of perjury, &c. Under this last enactment, such swearing as is described in this affidavit, if false, is perjury. It is true that the words willfully and corruptly are omitted, but there is enough stated to authorize the justice of the peace to issue his warrant; and if he were legally authorized to issue his warrant, the proceedings are sufficiently legal to be the foundation of an action for a malicious prosecution. The affidavit must impute the guilt of a criminal offense, or it will not sustain the action. *Leigh v. Webb*, 3 Esp. Rep., 165; *M'Neely v. Driskill*, May term, 1829; Note to *Usher v. Whiting*, 1 Blackf., 250. But it is not absolutely necessary that the charge should in all things, technically, in law language, legally describe the offense charged; for an action for a malicious prosecution may be supported for the malicious prosecution of a defective indictment. 6 Maule & Selw., 29.

The next error assigned is, that both counts of the declaration are materially defective.

To the first count two objections are raised: 1st, that the charge made by the defendant below against the plaintiff, on which the justice of the peace issued his warrant, was not sworn to as required by the 8th section of the bill of rights in the constitution of the State; 2d, that the charge as described in that count, is not a criminal offense.

As to the first objection to the first count of the declaration, it is not well taken. The bill of rights in our constitution, does not make any new law on that subject; it only compels a

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compliance with what was the law both in *England* [\*213] and *America*, \*and hence it does not change the established form of pleading. Undoubtedly, the declaration might have stated in terms that the charge was made under oath, and it might be best to do so, as it would save any question about it; but it is not essentially necessary.

The other objection is of a very different character. It requires a more serious consideration. This count is certainly, in many particulars, not very technically drawn. It does not clearly appear, that the defendant charged the plaintiff with any criminal offense. In actions of this kind, the declaration ought to aver in plain terms that the defendant charged the plaintiff with some criminal offense, by the name or description given to it by law, and not merely state the acts of the defendant by which he made the charge, without drawing any legal conclusion from those facts. In this case the defendant charged the plaintiff with perjury, and the declaration should have averred that fact, by the legal name or the legal description of that offense. Whether the affidavit which the defendant made amounted to a charge of perjury, was entirely a matter of evidence. If the declaration did contain the averment that the defendant charged the plaintiff with the crime of perjury, by setting out its legal name or its legal description, we should have no hesitation in saying that the affidavit produced sustained the declaration, although the offense is defectively described in the affidavit. It is a general rule, which can seldom be safely departed from, that facts essential to the right of the action must be expressly and substantially alleged. The stating of the evidence of the fact is not sufficient. The fact itself should be stated; otherwise the allegation presents no subject to which the law can be applied. The established rule in all civil pleadings is, that all things must be pleaded according to their legal effect, that is, they must be stated or described as they operate or take effect in law; although such statement or description should literally vary in form from the shape of the evidence.



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It is insisted by the defendant in error, that, after the trial of an issue on the plea of not guilty by a jury, the verdict cures such defects as these. This position as a general doctrine, the plaintiff in error admits, but contends that it is not applicable to this case. He says that by the 46th section of the statute regulating the practice of law, it is enacted, that when [\*214] there \*are several counts, one of which is faulty, and entire damages are given, the verdict shall be good, but the defendant may apply to the court to instruct the jury to disregard such faulty count; and that it appears of record by his bill of exceptions, that in this case he did move the Court so to instruct the jury as to this count, but that the Court overruled that motion, to which he excepted; and that that exception saves to him the benefit of that motion in this Court, unprejudiced by the verdict of the jury.

That the plaintiff in error is entitled to the full benefit of his motion, unprejudiced by the verdict of the jury, there is no doubt. But there may perhaps be some doubt, as to what defects and insufficiencies the legislature intended the statute to extend. The language is general, and there is no intimation as to the precise meaning intended to be given to the word "faulty." To arrive at a fair interpretation of the intention of the legislature, we must see how the law would stand if that statute had never been enacted. The general rule of law is, that where there are good and defective counts in the declaration, and the jury, upon a plea to the whole declaration, find a general verdict for the plaintiff and assess entire damages, the defendant may arrest the judgment. The object then must have been, to prevent an arrest of judgment after a general verdict, in all cases, if there were one good count in the declaration. But as such a sweeping *cure-all* might frequently, in practice, do great injustice to the defendant, the latter part of the section was added, authorizing him to have those counts of the declaration, which were so defective as to authorize an arrest of judgment after verdict, rejected.

It seems, then, that this motion is confined to such insufficiencies and defects as would authorize an arrest of judgment

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in such cases, if the statute did not exist. The inquiry then is, what defects are a sufficient ground for arresting judgment after a general verdict? Upon common law principles, aided as they now are by the general statutes of *jeofails*, all formal defects and errors in the record, as well as many which have formerly been deemed substantial, are cured by verdict; but defects which would render a judgment erroneous, are still a sufficient ground for arresting. The criterion by which to distinguish between such defects in a declaration as are, and such as are not, cured by a general verdict for the [\*215] plaintiff, is laid down \*by Lord Mansfield in the case of *Rushton v. Aspinwall*, 2 Doug., 679, to the following effect: Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favour; because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial; and it is, therefore, a fair presumption that they were proved. But where no cause of action is stated, the omission is not cured by verdict; for as no right of recovery could be legally proved under such a declaration, there can be no ground for presuming that it was proved; or, in other words, no fact not alleged can be presumed in support of a verdict, unless proof of its existence must have been involved in or inferable from the proof of those which are alleged. *Spiers v. Parker*, 2 Doug., 682, n. If then the declaration is defective in substance as to the alleged cause of action itself, as in an action of slander for calling the plaintiff a Jew; or, as in *assumpsit*, if the declaration alleges no consideration; or, as in an action by a master for a battery committed upon his servant, if the declaration omits to allege loss of service; or, as in an action for an injury done by the defendant's dog to the person or goods of the plaintiff, and the declaration omits the *scienter*; and in all other cases, when any substantial fact is omitted which is essential to a right of action, and it is not implied or inferable from those facts which are alleged, a verdict for the plaintiff will not entitle him to recover.

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If this view of the case be correct, and of that perhaps there is no doubt, we think that the first count of the declaration would be good upon a motion in arrest of judgment, after a general verdict for the plaintiff, and therefore the court acted correctly in overruling the motion to disregard it.

To the second count five objections are raised: 1. That the charge made by the defendant below against the plaintiff, on which he was arrested as described in the second count, is not a criminal offense; 2. It does not appear that the charge was made under oath; 3. It does not appear that the charge was made to a justice of the peace, or any other judicial officer or tribunal; 4. It does not appear that the plaintiff was arrested or held in prison by legal process, or in pursuance of law in any way, or by any civil officer of the law; 5. Nor does it appear that the plaintiff was tried or discharged by any judicial officer \*or tribunal. These objections are all strictly true, and some of them are certainly well taken. This count omits some of the substantive facts, which are essential to the right of this action, and which can not be implied or inferred from those alleged, and the Circuit Court should have instructed the jury to disregard it. An action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceeding, before some judicial officer or tribunal. If the proceedings complained of are extra-judicial, the remedy is trespass, and not an action on the case for a malicious prosecution.

*Per Curiam.*—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*W. W. Wick* and *W. Quarles*, for the plaintiff.

*C. Fletcher* and *H. Brown*, for the defendant.

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Conduit v. Dicken.

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## CONDUIT v. DICKEN.

**MALICIOUS PROSECUTION—EVIDENCE.**—*A* charged *B* before a justice with having committed perjury, on a trial between them, in a justice's court, upon which charge a warrant issued against *B*, and he was thereon arrested. For this arrest *B* brought an action of malicious prosecution against *A*. *Held*, that the original affidavit and warrant were admissible evidence for the plaintiff. *Held*, also, that after the defendant had given in evidence the record of the cause in the justice's court, in which he had recovered, the plaintiff might show that, on appeal, the judgment was against the defendant. *Held*, also, that in such case the declaration need not show the charge to have been under oath, nor the time when the perjury charged was committed.

ERROR to the *Hendricks* Circuit Court.

BLACKFORD, J.—*Dicken* sued *Conduit* in an action for a malicious prosecution. The declaration states that *Conduit*, on the 22d of *May*, 1832, went before a justice of the peace, and falsely, maliciously, and without any reasonable or probable cause whatever, charged *Dicken* with having committed perjury, &c. *Conduit* pleaded two pleas: 1st, the general issue on which issue was joined; 2d, that *Dicken* had, on the 18th of *May*, 1832, on a trial before a certain justice of the peace, &c., sworn false, &c.; that *Conduit* had therefore made the charge, &c. Replication of *de injuria sua propria* to the second plea, and issue.

[\*217] On the trial, *Conduit* filed two bills of exception.

The first bill shows that *Dicken* offered in evidence the original affidavit and warrant, by virtue of which he was arrested, &c. These were objected to, but admitted by the Court. The second bill shows, that after *Conduit* had introduced as evidence, the record of the cause in which he alleged the perjury to have been committed, and in which he had recovered, *Dicken* offered to read the record of the same cause, on appeal to the Circuit Court, in which he had succeeded. The record of the cause on appeal, tried after the commencement of the suit for malicious prosecution, was objected to,



but the objection was overruled. Verdict and judgment for the plaintiff below.

There are several errors assigned.

The first is, that the affidavit and warrant were not admissible as evidence. The bill of exceptions states that it was the original affidavit and warrant which were admitted in evidence. That they were the originals, instead of copies, was surely no objection. The plaintiff in error contends that they ought to have been proved. He forgets, however, that his bill of exceptions admits them to be the original papers.

The second error assigned is, that the record of the action on appeal should not have been admitted. The plaintiff in error had himself given in evidence the record of the same cause before the justice, to show that he had recovered. It followed, of course, that his opponent might show that the final result of the cause, on appeal, had been otherwise.

The third objection is, that the declaration does not aver that the charge of perjury had been made by the defendant under oath. There was no occasion to make such an averment. The declaration is in the usual form. It was necessary to prove that an affidavit had been made, but it was not necessary to aver it in the declaration.

The last ground relied on is, that the record does not show when the perjury charged was committed. That the declaration does not show this, can be no objection to the judgment. If proof of it was necessary, there is nothing to show but that it was proved. Besides, the time alluded to is stated in the special plea.

*Per Curiam*.—The judgment is affirmed with costs.

*J. B. Ray* and *J. Eccles*, for the plaintiff.

*C. Fletcher, W. W. Wick* and *H. Brown*, for the defendant.

## Trimble v. Gilbert.

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## \*TRIMBLE v. GILBERT.

DAMAGES—EVIDENCE.—Action on the case for causing water to flow back on the plaintiff's land, and thus producing a loss of his building materials on the premises. Plea, not guilty. *Held*, that the plaintiff could not prove, in aggravation of damages, a loss of building materials on the land, if they belonged to the plaintiff and another in partnership.

ERROR to the *Delaware* Circuit Court. *Trimble* was the plaintiff below and obtained a verdict and judgment, but being dissatisfied with the amount, sued out this writ of error.

M'KINNEY, J.—Trespass on the case. This action is brought to recover damages for the alleged loss of a mill seat, a spring and materials for building a mill, caused by the flowing back of water by the erection of a dam, below the plaintiff's land, by the defendant. Plea, not guilty. Verdict and judgment for the plaintiff.

A bill of exceptions presents for our consideration the correctness of the opinion of the Circuit Court, rejecting certain testimony offered by the plaintiff. It appears that the plaintiff, after he had given evidence of the erection and continuance of the dam, just below his land, by the defendant, and proved the flowing back of the water to the injury of his mill seat, offered to prove in aggravation of damages, that in the summer of 1828, he and two others entered into partnership to erect a mill on said land, and that the plaintiff individually expended in preparations to erect the mill, at least \$100; and that upon the erection of the dam, the flowing back of the water and spoiling the mill seat, the building of the mill was abandoned, and the materials lost; that this evidence was rejected by the Court, because the witness had previously stated that no money was expended until after the partnership.

This action is proper for the recovery of damages, for an injury such as is complained of; and the plaintiff, after proving the acts constituting the cause of action, is permitted to prove in aggravation of damages, other acts which of themselves,

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though not relied on as the cause of action, may produce incidentally a loss to the party, flowing from the original act. In the present case, though the loss of the mill seat is the foundation of the action, yet the plaintiff would have the [\*219] right, if \*materials to erect a mill, prepared and collected by him individually, were destroyed by the act of the defendant, to give a loss from such act in evidence, in aggravation of damages. If, however, the materials were the property of a partnership, of which the plaintiff was a member, the injury done is to the partnership, and to obtain remuneration, a joint action should be brought. An action in the name of one of the partners for a joint damage, would be clearly subject to a plea in abatement, and, consequently, in an original action by one of the firm, on a different foundation, if it be attempted to give such injury in evidence, in aggravation of damages, the only course is to move the rejection of such evidence.

The fact of the partnership, and the expenditure of money for materials being made jointly, is apparent from the record, so that the evidence proposed was inadmissible. To have admitted this testimony would have been the assumption of chancery jurisdiction, and have required, after an adjustment of the respective claims of the parties, the ascertainment of the particular loss of the plaintiff. With equal propriety, each of the other partners could maintain a several action for this joint injury, and thus the maxim *ut sit finis litium*, with the distinction between actions and rights, would cease to exist.

The Circuit Court was correct in excluding the evidence.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Rariden*, for the plaintiff.

*M. M. Ray*, for the defendant.

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Fullerton v. Warrick.

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## FULLERTON. v. WARRICK.

ASSAULT AND BATTERY—EVIDENCE IN MITIGATION OF DAMAGES.—The defendant, in an action for an assault and battery, can not prove, in mitigation of damages, that the plaintiff had previously slandered him, if there had been time, between the provocation and the assault, for deliberate reflection (a).

ERROR to the *Gibson* Circuit Court.

STEVENS, J.—*Fullerton* brought an action of trespass, assault and battery, against *Warrick*, in the *Gibson* Circuit Court. An issue on the plea of not guilty was joined between the parties, a jury trial had, and a verdict rendered for the plaintiff.

[\*220] \*It appears of record by a bill of exceptions, that the defendant, on the trial before the jury, was permitted by the Court to prove, in mitigation of damages, that the plaintiff had been for several years past, and up to the time of the commission of the assault and battery, in the constant habit of abusing and slandering the defendant; that about one year and a half before the trial, which was about one year before the time of committing the trespass complained of, the plaintiff said that the defendant was an unprincipled man and a liar; and that at an election for trustees of the town of *Princeton*, held several years before the time of committing the assault and battery, the plaintiff voted a ticket for trustees, in which he connected the name of the defendant with the name of a man of color. To the introduction of this evidence, the plaintiff objected, but the objection was overruled and the evidence went to the jury. There is no proof appearing of record, that there was any insult, abuse, or offensive language, given or used by the plaintiff at the time the trespass was committed. The expression used in the bill of exceptions, does not sufficiently convey any such an idea.

The only question before the Court is, whether the evidence

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(a) *Schlusser v. Fox*, 14 Ind., 365.



set out in the record was correctly permitted to go to the jury, in mitigation of damages?

The law, in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from a sudden heat. As, if upon a sudden quarrel two persons fight and the one kills the other, this has been adjudged only manslaughter. So, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, the offense is mitigated homicide. But in every case of homicide upon provocation, if there be any time intervening between the insult and the killing, sufficient for passion to subside and reason to interpose, the offense becomes murder. In analogy to this principle, evidence in civil actions for assault and battery is admitted, in mitigation of damages, to show a provocation on the part of the person complaining of the injury. But the provocation must be so recent as to induce a fair presumption that the violence done, was committed during the continuance of the feelings and passions excited by it, before the blood has had time to cool: a different rule would greatly encourage [\*221] breaches \*of the peace, rencounters, and brutal force.

For the purpose of illustration, we will notice two or three leading cases.

First, the case of *Avery v. Ray et al.*, 1 Mass. Rep., 12. This was an action of trespass, assault and battery, tried on the plea of not guilty. The defendant offered to prove, in mitigation of damages, that the plaintiff reported that the sister of *Ray*, one of the defendants, had openly solicited the plaintiff to have carnal connection with her; that *Ray*, having heard that, called on him to know whether he had or had not said so, and that he refused to confess or deny it; that the defendant then told him that he would chastise him for it, and did so do; and for that chastisement the action was brought. The court said that the admission of such evidence is contrary to all rule; that immediate provocations are admitted in mitigation of damages, but when time for reflection has intervened, so as to give the blood time to cool, they are not admitted.

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Secondly, the case of *Lee v. Woolsey*, 19 Johns. Rep., 319. This was an action of trespass, assault and battery, also, tried on the plea of not guilty, in the month of *July*, 1820. The defendant was a post-captain in the navy, and the plaintiff was an attorney at law. On the trial the defendant offered to prove, in mitigation of damages, that in the month of *February* preceding, the plaintiff had addressed to the Secretary of the Navy a scandalous and defamatory letter respecting the defendant, charging him with having embezzled the public property under his care as a post-captain, and that that letter had been circulated among the citizens of the place where the parties resided, and had been known to the defendant only a few hours before the time of committing the violence complained of; and that at the time of committing the violence, and before the commencement of the attack, the defendant asked the plaintiff whether he was the author of that scandalous and defamatory communication or not, and he admitted that he was, but stated that he wrote it as an attorney, and was paid for it. The defendant also offered to prove that on the day before the attack was made by him on the plaintiff, the plaintiff had made scandalous insinuations against him respecting his having embezzled the public property. The court said that the evidence was not admissible in mitigation of damages, there having been time between the provocations and the assault for deliberate reflection.

[\*222] \*We will notice one other case only, and that is the case of *Rochester v. Anderson*, 1 Bibb, 428. In that case the defendant offered to prove, in mitigation of damages, that the plaintiff had circulated slanderous reports about him, and for that he had assaulted him. The Court refused the evidence on account of the time which intervened between the time of giving the insult and the time of making the assault. The Court in that case says that such opprobrious language, if used at the time of the battery, and especially if used with an intent of provoking a quarrel, would be legal evidence in mitigation of damages; but if there have been time for deliberation, the peace of society requires that men should suppress their passions.

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The State, on the relation of Crane, v. Beem and Others.

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There is nothing upon the record before us which authorizes us to presume that the evidence in question was correctly permitted to go to the jury.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*R. Crawford*, for the plaintiff.

*S. Hall*, for the defendant.

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## THE STATE, on the relation of CRANE, v. BEEM and Others.

PRACTICE.—After the plaintiff has closed his examination of testimony, and the defendant has asked the Court to instruct the jury relative to their verdict, it is too late for the defendant, except under special circumstances, to introduce any evidence.

SAME.—The court is authorized by statute, in certain cases, to give a judgment, as in case of a non-suit; but a jury can not, in any case, find a verdict to that effect.

SAME.—A judgment ought not to be reversed on account of the improper admission of evidence, if the verdict is right independently of that evidence.

ESCAPE.—An execution-plaintiff can not recover on a sheriff's bond in the case of an escape, unless he shows a judgment against the execution-defendant (*a*).

COSTS.—The party for whose use an action is brought in the name of the State is liable to a judgment for costs, under the statute, if the suit be not sustained

## ERROR to the Jackson Circuit Court.

BLACKFORD, J.—This was an action of debt on a sheriff's bond, instituted in the name of the State, on the relation of *Crane* against the sheriff and his sureties. The declaration [\*223] avers that the relator recovered judgment before a justice of the peace against *Tuell*, caused him to be arrested on a *ca. sa.*, and to be delivered to the sheriff; that the sheriff suffered the debtor to escape, &c. Pleas, 1st, that though *Tuell* had made oath that he was unable to support

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<sup>1</sup> (*a*) See *State v. Spencer*, 4 Blackf., 310.

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The State, on the relation of Crane, v. Beem and Others.

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himself in prison, the relator had refused to support him; 2d, that the sheriff did not permit *Tuell* to escape, &c. Replication to the first plea, denying the refusal. Issues on the second plea and on the replication.

It appears by bills of exception, that all the evidence given by the plaintiff was—the execution, the arrest, the delivery of the debtor to the sheriff, and his subsequent absence from prison. The defendant, after the plaintiff had closed his evidence, moved the Court to instruct the jury as in case of a non-suit. This motion was overruled. The defendant then offered to introduce evidence on his part. To this the plaintiff objected; but the Court overruled the objection. A bond, executed by *Tuell* and his surety for the prison bounds, was offered in evidence by the defendant, which, though objected to, was admitted.

Verdict and judgment for the defendant, with a judgment against the relator for costs.

The first question presented is, had the defendant a right to introduce any evidence after asking instructions to the jury? It is evident that, as a general rule, he had no such right. The defendant's asking the Court to give instructions to the jury, pre-supposes that he had finally submitted the cause to the jury; and, after such a submission, he could have no right, except under special circumstances, to offer any new evidence. In this case, however, as the record is silent as to what were the circumstances under which the testimony was admitted, we must presume the Court had a good cause for admitting it, though the admission was contrary to a general rule of practice. We cannot pass by this part of the case, without noticing the extraordinary nature of the instructions to the jury asked for by the defendant. The Court was asked to instruct the jury as in case of a non-suit. There is no such verdict known to the law as that here referred to. The Court is authorized by statute in certain cases, to give a judgment as in case of a non-suit; but a jury can not, in any case, find a verdict to that effect. The Court must be always right in refusing to instruct the jury to find such a verdict.



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The State, on the relation of Crane, v. Beem and Others.

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The second point is, that the bond for the limits [\*224] was not legal \*evidence. It is contended by the defendant, that though that evidence be struck out as illegal, still the record shows that the plaintiff had no right to recover. We agree to the position, that if a verdict is right, independently of evidence improperly admitted, the judgment ought not to be reversed. This point was decided by this Court in the case of *Henthorn v. Doe, d. Shepherd*, May term, 1822. It has been frequently decided in *England*. The latest case we have seen on the subject, is *Doe, d. Teynham v. Tyler*, 6 Bing., 561. The question then is, could the plaintiff have recovered, had the bond for the limits not been admitted? We think there can be no doubt as to this. One of the questions in issue was, whether there had been an escape, that is, such an escape as would entitle the plaintiff to recover in this cause? The declaration avers the existence of a judgment on which the execution had issued. That averment was necessary; and, without it, the declaration would have been bad in substance. It was so decided in *Jones v. Pope*, 1 Saund., 34. But, in the case before us, though the declaration contains the necessary averment of a judgment, there was no attempt on the part of the plaintiff to prove it. He went no further back with his evidence than the execution. That was not sufficient. Without a judgment, there could be no escape, for which the sheriff and his sureties would be liable to the execution-plaintiff. 2 Phill. Ev., 231; 1 Selw. N. P. Wh. Ed., 515 (1). Assuming, therefore, that the bond for the prison limits was illegally admitted in evidence, as contended for by the plaintiff, and supposing it therefore to be struck out of the case, the verdict for the defendant is still right. The plaintiff cannot complain of the admission of illegal testimony when, had the testimony been rejected, he could not have recovered.

The third point is, that there could be no judgment against the relator for costs. Were it not for the statute on the subject, this objection might be good, but we think that, under the statute, the judgment cannot be objected to (2).

Shirley v. Hagar.

*Per Curiam*.—The judgment is affirmed, and judgment against the relator for costs.

C. Dewey, A. C. Griffith, and J. H. Farnham, for the plaintiff.

J. Sullivan, for the defendant.

(1) *Hall v. Johnson*, in this Court, May term, 1834, post, accord.

(2) See note to *Eaton v. Benefield*, Vol. 2 of these Rep., 52.

[\*225]

## \*SHIRLEY v. HAGAR.

CAPIAS AD RESPONDENDUM.—A *capias ad respondendum* issued in vacation, must be returnable to the first day of the next term of the court; if a term intervene between the date and return, the writ is void (a).

PRACTICE.—A cause being called on the first day of the term, the parties agreed that they had appointed the next day for trial, and, on the plaintiff's motion, the defendant was ruled to plead on the next day, he reserving the right to plead in abatement. *Held*, that these circumstances did not preclude the defendant from afterwards moving, on the day the rule was granted, to quash the writ (b).

PLEADING.—A declaration stating that the plaintiff sues by *prochein amy*, without showing the plaintiff's infancy, and the *prochein amy's* admission, is bad on general demurrer (c).

ERROR to the *Hancock* Circuit Court. In this action, *Mary Ann Hagar*, by *John Hagar*, her father and next friend, was the plaintiff below, and *Ambrose Shirley* the defendant. Verdict and judgment for the plaintiff.

M'KINNEY, J.—This is an action of trespass on the case in slander. The declaration contains two counts, and the words charged in each import incontinence. The record presents a number of points, in which the writ, the declaration, three

(a) *Shirley v. Hager*, 11 Ind., 391; *Tiegenhager v. Doe*, 1 Ind., 296; *Crocker v. Dunkin*, 6 Blackf., 535.

(b) See *Scott v. Hall*, 14 Ind., 136, and cases there cited.

(c) *Maxedon v. The State ex rel.*, 14 Ind., 370; *Wortman v. Ash*, 4 Id., 74; 5 Blackf., 435. See Post, 172.

## Shirley v. Hagar.

special pleas of justification, instructions given and refused to be given by the Court, with the particular character in which the plaintiff sues, are before us.

The first bill of exceptions shows that on *Wednesday*, the 29th day of *February*, 1832, it being the first day of the *February* term, on calling this cause, both parties agreed that the ensuing day had been appointed by them for the trial; that on the plaintiff's motion the Court ordered a rule for a plea on or before the next morning, the defendant reserving his right to file a plea in abatement; that on the Court's convening on the said day, at 2 o'clock, the defendant moved, before any pleas were filed, to set aside and quash the writ for defects on its face, the writ being returnable on the *Wednesday* after the last *Monday* in *August* next, and bearing date the 19th of *January*, 1832; that the motion was overruled by the Court on the ground that taking the rule to plead as aforesaid constituted an appearance, which precluded the defendant from taking an exception to the writ. By the act fixing the times of holding

courts in the several judicial circuits, the courts in [\*226] *Hancock* \*county are required to be annually held

"on the *Wednesday* succeeding the last *Mondays* in *February* and *August*;" and by the act regulating suits at law, "all process (except *subpœnas*) are made returnable to the first day of the next term." The time of holding each term of the court, and the day of the return of all process (except *subpœnas*) are thus fixed by law. The writ dated in *January* is made returnable to the *August* term. Between the date of the writ and the *August* term is interposed by law the *February* term, and the law requiring a writ to be made returnable to the next term, that is, the term immediately succeeding its date, the writ in this case, with reference to its date, being made returnable to a day *non-juridicus*, is clearly a nullity, and should, on motion, have been quashed. *Atkinson v. Taylor*, 2 Wils., 117; *Parsons v. Loyd*, 3 Ib., 341; Barnes' Notes, 76, 409, 410, 420; 6 Com. Dig. Pl. In *Shirley v. Wright*, 2 Salk. R., 700, it is said that all *mesne* process must be made returnable to the same or the next term; and if a term be omitted, the writ is void, for

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otherwise the defendant might be kept unreasonably long in prison.

It is, however, contended that an appearance was entered by the defendant, and the error of the process thus cured. That appearance cures all errors and defects in process, is settled law; 6 Com. Dig., 8; Barnes' Notes, 163, 415, 167; and if an appearance was entered, the defendant is concluded. We will examine what constitutes an appearance, and apply the law to the acts of the defendant as presented by the record. It is said that there is no appearance unless of record, for whether he appeared or not ought to be tried by the record; 6 Com. Dig., 8; 1 Tidd, 213; and that an appearance to a writ should be entered in the filacer's office, by plea, or motion, or entry on docket, or some official act. Crabb's Hist. Com. Law, 559. This being the law, we do not discover from the record an appearance by the defendant, and must conclude, there being none, that the defendant could plead in abatement, or move to quash the writ.

It would not seem admissible to divest the defendant of a legal right, by the act of the plaintiff, or by the order of the court. The rule to plead was granted on motion of the plaintiff; but still the defendant reserved to himself the right, which at that time could not be affected by the rule, of pleading in abatement; thus manifestly showing there was [\*227] no waiver of a \*right. By the practice act, "pleas in abatement shall be filed on or before the day for which the cause was docketed, at the first term at which it stands for trial;" so that the defendant had the day on which the rule was granted for the plea in abatement. The agreement of the parties, that the ensuing day was appointed for the trial, is insufficient to constitute an appearance. The trial was itself dependent on contingencies, among which is not least to be regarded, the defendant's waiver of exception to the writ and pleading to the action. The record shows that the ground of the court's refusal to sustain the motion to quash, was the defendant's taking the rule to plead. It would seem that the rule was on the plaintiff's motion, and that the defendant was passive, except in the reservation of the right to plead in



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abatement; a reservation which clearly constitutes a qualification of an implied consent to the rule.

We think the motion to quash the writ should have been sustained, the writ being a nullity, and the defendant not having waived a right to make the motion.

The motion to quash the writ being overruled, the defendant demurred to the declaration, which being also overruled, he withdrew the demurrer, and filed four several pleas—1st, the general issue; and three special pleas of justification. Issue on the first, and special demurrer to the others. The questions presented by these pleas, and growing out of the instructions given and refused to be given by the court during the trial, are of moment, but it does not appear to us that an opinion, in relation to them, is necessary in this case. We will, therefore, proceed to examine the objection made to the character in which the plaintiff sues. She sues by *prochein amy*, without an averment in the declaration of infancy, or of the admission of the *prochein amy* by leave of the court. This is assigned as error, and it is contended by the defendant in error, that the objection is not well taken, because the law will presume infancy, and therefore its averment is unnecessary.

At common law, an infant could neither sue nor defend, except by guardian. Lawes on Pl. in Assump., 432; Harg., note 1, to Co. Litt., 135, b. By the statutes of West. 1, 3 *Edw.* 1, ch. 49, and West. 2, 13 *Edw.* 1, ch. 15, he is authorized to sue by *prochein amy*. In all cases, however, it is error if an infant, though sued with others, does not defend by guardian.

Harg. notes, 1, 2, to Co. Litt., 119, 120. In either [\*228] character, as \*plaintiff or defendant, prior to the statutes of Westminster, and subsequent thereto when defending, the guardian is by the special appointment of the Court. *Ibid.* The reason why an infant, irresponsible for costs, and without the maturity of judgment, such as the law requires to give validity to contracts, should sue by *prochein amy*, is thought obvious. It is to meet a liability for costs, to restrain from ruinous litigation, and to afford to the inexperience of legal minority, through the intervention of the Court,

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a necessary protection. A *prochein amy*, therefore, sues by the permission of the Court, and the fact of such permission being given, should appear in the declaration, or it is error; 2 Saund. R., 117, f. n. 1; and it is the duty of a Court, if informed that a suit by *prochein amy* is not for the interest of the infant, to arrest the proceeding. This power, possessed by the Court, is connected with its general superintending control over infants. 2 Saund. Pl. and Ev., 580; Gould's Pl., 249; Bac. Abr. Infancy, K, 2. The presumption of infancy is never indulged. As a ground of relief, it must be shown; and of defense, be either pleaded or given in evidence. It is said, he ought to appear to be an infant; for, if he sues at full age by guardian or *prochein amy*, it is error. 6 Com. Dig. Pl. 2 c, 1, p. 302; 2 Inst., 261. The right to sue is inseparably connected with the legal interest, and the fact that the legal interest in the action remains in the infant, though suing by *prochein amy*, is demonstrated by the exercise of the rights by courts, to dismiss the *prochein amy* for various causes, for malconduct in the management of the cause, if required as a witness, or from lapse of time, if the infant before the end of the suit attains full age. The right then to sue by *prochein amy* being dependent upon minority, and the admission of the *prochein amy* by the court, these facts should appear on the declaration, or it is error (1).

Being of opinion that the suit was improperly brought, the question occurs, in what manner should the objection have been taken? The defect appears on the declaration, and is the subject of demurrer. A demurrer to the declaration would have reached it, but as the demurrer to the declaration was withdrawn on being overruled, the objection was available on the issue at law to the pleas, as that issue assumed on the part of the plaintiff the sufficiency of the declaration.

[\*229] \*We are, therefore, of opinion that the judgment of the Circuit Court must be reversed.

*Per Curiam*.—The judgment is reversed with costs.

*J. B. Ray* and *J. Eccles*, for the plaintiff.

*C. Fletcher*, *H. Brown* and *W. W. Wick*, for the defendant.

Powers v. Hurst.

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(1) Commencement of the declaration by an infant: *Marion* county, ss. *A B* by *E F*, who is admitted by the Court here to prosecute for the said *A B*, who is an infant within the age of twenty-one years, as the next friend of the said *A B*, complains of *C D* being in custody, &c. For that whereas, &c. 2 Chitt. Pl., 32.

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## SYBERT and Others, Commissioners, v. ELLIS, in Error.

SUIT by *Ellis* against *M'Cartney*, *Sybert*, and *Shawl*, commissioners of *Madison* county, for work and labor done for the county. Judgment by default. *Held*, that the judgment should show that the amount was only to be collected from the property of the county. See 5 Blackf., 141.

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## THE STATE v. MITCHELL, in Error.

IT was *held* in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional.

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## POWERS v. HURST.

ATTACHMENT—AFFIDAVIT.—An affidavit for a foreign attachment against the heirs of a judgment-debtor, must state the names of the defendants, and expressly aver them to be non-residents: If the affidavit state the heirs to be "*A* and others unknown, who are not all residents in *Indiana*," it is insufficient.

SAME.—The affidavit in such case, if no declaration be filed, must show that there is no executor nor administrator, nor personal assets to discharge the debt.

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Powers v. Hurst.

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[\*230] \*ERROR to the *Harrison* Circuit Court. This suit was instituted by *Henry Hurst* against *Clement Powers* and others, whose names are unknown, heirs of *Walter E. Powers*, who all are not residents of the State.

M'KINNEY, J.—Foreign attachment. Judgment in the Circuit Court for the amount claimed by the plaintiff below. Exception is taken to the whole proceeding, by an assignment of errors, which reaches the affidavit, the writ, the bond, the publication and the judgment. In a proceeding of this kind, in its nature *ex parte*, and affording a peculiar remedy, the security of the rights of those who may become the objects of its operation, has induced the adoption of a rule of construction, by which nothing is conceded to presumption in any of its stages; but he who avails himself of the remedy, is bound to a strict compliance with the provisions of the statute. This conformity to the statute must appear in every step taken.

As the first error assigned questions the sufficiency of the affidavit, and as that is the foundation of the proceeding, it is proper that it should be first in the order of examination. The affidavit states: "that on the 20th of *April*, 1820, in the *Jefferson* Circuit Court, *Kentucky*, the plaintiff recovered a judgment against *Walter E. Powers*, for \$2,000, with interest at the rate of 6 per cent. per annum from the 25th of *December*, 1819, until paid, and seven dollars and thirty cents costs; that since the judgment, the defendant has died, leaving heirs *Clement Powers* and others unknown, who are not all residents of *Indiana*; that the judgment has never been paid, nor any part thereof, by the decedent in his life-time, nor by said heirs since, nor by any other person." This affidavit is founded on the act of 1824, Rev. Code, 68, s. 1, which renders liable for debts or demands against decedents, estates, &c., which may have descended to non-resident heirs. As the proceeding can only be maintained against non-residents of the State, the affidavit should state positively, that the defendants are non-residents; if this is not stated, the plaintiff is not entitled to this extraordinary remedy.



The proceeding is instituted against *Clement Powers* and others unknown, alleged to be the heirs of the judgment-defendant, who, it is said, "are not all residents of *Indiana*." This statement of non-residence is indefinite, and clearly insufficient. If a part of the heirs were residents, they could not be joined with those who were non-residents.

[\*231] From the \*expression used, "who are not all residents of *Indiana*," a part at least must be considered as being residents, and therefore, exclusive of other objections, the affidavit would be defective. The statute authorizing the proceeding against non-resident heirs, does not authorize it against them *eo nomine*, but leaves to the rules of the common law, the mode of enforcing their liability, subject to the particular provisions of the statute. We have no recollection of a proceeding at common law against unknown heirs. At common law or in equity, if heirs are required to be made defendants to a suit, it is the duty of the plaintiff to render them such by their proper names.

We are further of opinion that the affidavit, as there is no declaration filed, should have shown that there was no executor or administrator, or personal assets to discharge the debt, since personal assets are primarily liable for the debts of the decedent, and it is only on their exhaustion that the heir becomes responsible. Even then his responsibility is qualified. An estate in land must have descended to him, and it is only to the value of the land so descended that he is liable.

Without extending this examination further, we will remark that errors equally as fatal as those noticed appear in the subsequent proceedings, and that the judgment must be reversed.

*Per Curiam*.—The judgment is reversed, with costs. To be certified, &c.

*J. H. Farnham*, for the plaintiff.

*C. Dewey*, for the defendant.

## STUTSMAN v. STUTSMAN.

WRITTEN CONTRACT—PAROL EVIDENCE TO VARY.—*A* gave his promissory note to *B* for an antecedent debt, and afterwards confessed a judgment without any qualification, in favour of the payee for the amount of the note, and the interest then due on it. *Held*, that *B* could not be relieved in chancery from the interest charged on the note and included in the judgment, on the ground that, by a parol contract when the note was given, no interest was to be charged (a).

[\*232] \*ERROR to the *Clark* Circuit Court.

STEVENS, J.—About twenty-two or twenty-three years ago, one *Jacob Stutsman* departed this life, leaving several children, and also leaving a considerable estate, both real and personal. Previous to his death he made his will, leaving his estate to his children by way of legacies, to be paid to them in money, and appointed the plaintiff in error, *Daniel Stutsman*, one of his children, the executor of his will, who, after the death of the testator, took upon himself the execution thereof. At the time of the death of the testator, several of his children, that is to say, the defendant in error, *David Stutsman*, *Jacob Stutsman*, jun., *Samuel Stutsman*, and perhaps some others of the children, were severally indebted to the testator more than the amount of their legacies, which debts were evidenced by the promissory notes of the debtors, and these notes had been due for some years before the death of the testator; others of the children owed nothing.

About six or eight years after the testator's death, the executor and legatees met together to settle, and it was agreed among them that no interest should be calculated on those debts due from the children, but that the settlement should be made for the amount expressed on the face of the notes, without adding any interest thereto, and that the executor should pay no interest to the legatees on the legacies due to them, and upon that basis a final settlement took place. Upon that settlement so made upon the basis aforesaid, the defendant in error, *David*

(a) See *Morgan v. Snapp*, 7 Ind., 537.

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Stutsman v. Stutsman.

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*Stutsman*, fell in arrears in the sum of \$322.04, over and above his legacy, for which he gave his promissory note to the executor. Afterwards, on the 25th day of *August*, 1820, the plaintiff in error, the payee of the note, obtained a judgment in the *Clark Circuit Court* against the defendant, the payor of the note, by his confession in said court, on said note, for the sum of \$351.82, that sum being the amount of the note and the legal interest thereon at that time. This judgment the plaintiff afterwards collected, together with the interest that accrued thereon after the rendition of the judgment, and also the costs, by a levy and sale of the property of the defendant.

The defendant, *David Stutsman*, in the meantime exhibited his bill in chancery, in which, after giving a history [\*233] of the case, \*and stating substantially the facts aforesaid, he charges that by the settlement made as aforesaid, it was agreed and understood that he was not to pay any interest on said note, and that in justice he ought not to have paid interest. He further charges that when he confessed judgment on the note he supposed that the judgment would be for the face of the note only, and that he never knew until long afterwards that interest was cast upon it. He also charges that none of the children paid any interest on their debts, or received any on their legacies, &c. He concludes by praying relief, &c.

The plaintiff in error answering, admits the settlement made between him and the legatees, and that at that settlement no interest was calculated on either legacies due to, or debts due from, legatees. But he most positively denies, that there was any agreement or understanding that the defendant should not pay interest on the note, given for the balance due from him on that settlement. He positively asserts that the agreement about interest, related only to the interest that had then accrued on the legacies due to, and the debts due from, the legatees. He admits the judgment, and that it was collected, &c.; denies fraud, &c.

It is proved by the depositions of two of the legatees, that at said settlement made between the executor and the legatees,

it was agreed as herein before stated, and that the settlement was made upon that basis; that they neither paid nor received interest; that it was a year or two after the settlement, before some of them paid off the balances due from them to the executor, but they paid no interest; and that it was their understanding that no interest was to be charged in any event. Upon cross-examination, they said that they could not say whether the agreement about interest, extended to interest which might afterwards accrue, or was confined exclusively to the interest which had then accrued; but they were certain, that no time was given for the payment of those balances, that they ever heard of.

The Circuit Court, on this state of facts, rendered a decree in favour of the defendant in error, that the plaintiff in error should refund to him the amount of interest collected on said note, and also the costs of collection. To reverse which decree, this writ of error is prosecuted.

The facts as presented by the record do not sustain [\*234] the decree. \*The contract respecting interest, on which the defendant in error relies, does not reach the case: it was a contract between other parties. It was between the executor and the legatees of the testator, respecting interest then due on legacies, and on contracts between the legatees and the testator in his life-time, and not on contracts between the executor and legatees. It was a verbal contract, and was instantly carried into effect, by making a settlement agreeably to its terms. The contract between the plaintiff and defendant, was made after the other was acted upon. It is a written contract, and was the last act of the parties, and overrules and disannuls all previous verbal contracts, if any there were.

The *lex loci* forms a part of every contract, so far as its legal effect and construction come in question, and the instant the note in question was signed and delivered by the defendant, and the money therein promised to be paid became due, interest attached as matter of law, and nothing could prevent it but an express contract to the contrary, inserted in the contract as a part of it, or clear, satisfactory, and conclusive



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Platt and Others v. Judson.

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evidence of such contract, and that those terms of the contract were not complied with by reason of either fraud, accident, or mistake. No such evidence, however, has been produced. The evidence exhibited in the record, would not have sustained a defense against the note in the original action, and it surely cannot now, after an unqualified confession of judgment.

The confession of judgment, without any qualification or exception, and without any reservation of equity, confirms, without contradiction, the original contract, as contained in the note, and puts the case beyond the reach of relief. The excuse set up for thus confessing cannot be recognized, either at law or in equity, as either a defense or as a ground of relief.

*Per Curiam.*—The decree is reversed with costs. Cause remanded, &c.

*I. Hawk*, for the plaintiff.

*C. Dewey, I. Naylor and J. H. Thompson* for the defendant.

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## \*PLATT and Others v. JUDSON.

**FRAUD.**—A judgment was confessed to defraud a creditor, on which an execution was issued, and a sale made of the debtor's real estate—the purchaser having notice of the fraud. On a bill filed by the creditor intended to be defrauded (who, in the mean time, had obtained a judgment for his demand), the proceedings were set aside.

**PRACTICE.**—A decree *pro confesso* against a non-resident defendant, is not objectionable on account of its having been taken on the first day of the term; it appearing that the Court was satisfied, that due publication had been made agreeably to the order of the Court.

**SAME.**—If the charges in the bill be sufficiently explicit, the complainant, after a decree *pro confesso*, may have a final decree without the production of proof (a).

ERROR to the *Dearborn* Circuit Court.

**BLACKFORD, J.**—This was a case in chancery, in which *Judson* was the complainant, and *A. Platt, M. Platt, Lane* and

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(a) *Colerick et al. v. Hooper*, 3 Ind., 316.

*Jennison*, were defendants. The principal facts in the case, according to the bill, answers, and exhibits, are believed to be as follows:

In November, 1829, *Judson* commenced a suit in the *Dearborn* Circuit Court, on a note for \$339.92, against *A. Platt*, who, at that time, owned a tract of land in *Dearborn* county. In February, 1830, *Lane*, an attorney, at the request of *A. Platt*, commenced a suit in the name of *Jennison*, as plaintiff, in the *Dearborn* Circuit Court, against *A. Platt*, on a note alleged by *A. Platt* to have been given by himself to *Jennison*. On the 1st day of the *April* term, 1830, to which term the writs in both suits were returnable, *A. Platt* confessed a judgment in the suit he had caused to be brought against himself in favour of *Jennison*; and, by means of an affidavit, procured a continuance of the cause brought against him by *Judson*. *A. Platt* represented to *Lane*, the attorney, that *Jennison* had sent the note to him, *A. Platt*, from the State of *Vermont*, enclosed in a letter which stated that the note should be for the benefit of *M. Platt*, the son of *A. Platt*.

On the judgment confessed in favour of *Jennison*, *A. Platt* caused an execution to issue, and his land to be thereupon sold by the sheriff. His son, *M. Platt*, was the purchaser. The sheriff executed a deed for the land to *M. Platt*; but [\*236] there was \*no part of the purchase-money paid by *M. Platt* or by any other person, either to the sheriff or to any one else; nor did the sheriff pay any part of the purchase-money to *Lane*, the attorney, or to any other person. Afterwards, at the *October* term, 1830, *A. Platt* confessed a judgment in the suit brought against him by *Judson*. On this judgment an execution issued, and the same land that had been sold on the previous judgment, was again sold under *Judson's* execution and purchased by him. *A. Platt*, who occupied the land previously to any of these transactions, still continues in possession. The note, alleged by *A. Platt* to have been given by him to *Jennison*, was not produced, nor was the letter produced in which *A. Platt* says the note was enclosed to him by *Jennison*; nor was the absence either of the note or of

## Platt and Others v. Judson.

the letter in any way accounted for. There is no evidence whatever, that *Jennison* wrote the letter in which *A. Platt* says the note was sent to him; nor do we know what were the contents of that letter, except so far as *A. Platt* has thought proper to divulge them.

The bill charges that the commencing of the suit against *A. Platt* in favour of *Jennison*, the confession of the judgment by *A. Platt* in the suit, and the purchase of the land by his son, *M. Platt*, were fraudulent and void as to *Judson*; and were intended by the defendants, fraudulently, to secure the land of *A. Platt* to his own use, against the just debt of *Judson*.

The subpœna in this cause, being returned "not found" as to *Jennison*, and publication of the pendency of the suit having been made, the bill as to *Jennison*, who did not appear, was taken *pro confesso*. The other defendants answered and denied all fraud. The Circuit Court decreed that the judgment in favour of *Jennison*, the execution, sheriff's sale and deed to *M. Platt*, and all the other proceedings under that judgment, should be set aside as fraudulent and void as to *Judson*; and that the land should be subject to an execution to be issued on *Judson's* judgment. It was further decreed, that the complainant should recover costs against *Jennison*, and should pay costs to the other defendants.

There are only two of the defendants in this cause, whom the Court can recognize as being interested in supporting the judgment in favour of *Jennison*. One of them is *Jennison*, because he, if any one, was entitled to the debt; and *M. Platt* is the other, he having purchased the land under the [\*237] judgment. \**A Platt* cannot be interested in the support of the judgment against himself, if it be not fraudulent; and there is nothing to show that *Lane*, the attorney, had any interest in it.

The case is a very short one. There are no depositions. *Jennison* has permitted the bill to be taken as confessed, and *M. Platt*, in his answer, says nothing that can sustain his purchase. *M. Platt*, indeed, seems to have been merely the instrument used by his father to effect the fraudulent design

of securing the latter's land against the debt due from him to *Judson*. *M. Platt* admits that he never paid any part of the purchase-money for the land, and that his father still continues in possession. We are satisfied that *M. Platt* was not a *bona fide* purchaser for a valuable consideration. Whether, if he had been such a purchaser, he could hold the land if the judgment be fraudulent and void, we shall not now stop to inquire.

It is contended that the judgment itself was recovered for the benefit of *M. Platt*. It is only necessary, in reply to this, to observe that *M. Platt* does not pretend, in his answer, to any property in the judgment. He says that he never knew nor heard anything of the note to *Jennison* until after the commencement of the suit on it against his father; that he has no personal knowledge of *Jennison*, nor does he of his own knowledge know how or when the note came into the hands of *Lane*, the attorney who brought the suit. He says further that he is wholly without information whether *Jennison* intended the claim as a gift to him or not, and that he expects to pay the claim if ever called upon by *Jennison* or his heirs. It is in vain to contend, in the face of this statement by *M. Platt* himself, that he has any property in the judgment.

The other defendant, *Jennison*, who is interested in sustaining the judgment, has suffered the bill to be taken *pro confesso*, and a final decree has been, without proof, rendered against him. There are two objections made to the decree against *Jennison*.

The first is, that it was entered on the first day of the term, when the defendant had the right to answer at any time during the term. The order made at the *March* term, 1831, is, that the notice be published for four weeks successively, requiring the defendant to appear at the then next term of the court. The entry made on the first day of the next term after the order is, that the complainant having proved to the satisfaction of the court that due notice, &c., had been given [\*238] agreeably to the \*order of the court, therefore, &c.

We see no ground for any objection to this proceeding. The publication having been duly made according to the order of the court, must be presumed to have been made at the proper



time before the first day of the court, and, if so, the decree was correctly entered on that day.

The second objection is, that the final decree was rendered without proof. This question was discussed in this Court in the case of *Pegg v. Davis*, November term, 1829. The decision was that when the charges in the bill are sufficiently explicit, the complainant, after a decree *pro confesso*, may have a final decree, without the production of proof. In a very late *English* case, the Court says that "the effect of taking a bill *pro confesso* is, that all the facts stated in the bill are taken to be true, as against the defendant." *Landon v. Ready*, 1 Simons & Stuart, 44. This we consider to be the law, and we conceive, therefore, that it was not incumbent on the complainant in this suit to introduce proof against *Jennison* after the decree *pro confesso*. The facts contained in the bill are amply sufficient, and are stated with the necessary precision to warrant the decree made by the Circuit Court, and those facts must be considered, under the circumstances of the case and the provisions of the statute, as confessed by *Jennison* to be true.

It appears to us, therefore, that neither *Jennison* nor *M. Platt*, the only defendants whom the law can recognize as interested in sustaining the judgment of *Jennison*, has any ground of complaint against the decree, which sets aside that judgment and the proceedings under it, as fraudulent and void as to *Judson*.

The decree gives costs to all the defendants except *Jennison*. They could certainly ask no more.

*Judson*, the complainant, complains of that part of the decree which virtually sets aside the sale under his judgment. He, however, being the defendant in error, can not ask for a reversal of any part of the decree not complained of by the plaintiffs in error.

*Per Curiam*.—The decree is affirmed, with costs.

*A. Lane*, for the plaintiffs.

*G. H. Dunn* and *O. H. Smith*, for the defendant.

## Pollard, Administrator, v. Buttery.

## [\*239] \*POLLARD, Administrator, v. BUTTERY.

**EXECUTORS AND ADMINISTRATORS—PLEADING.**—If an executor or administrator sue on a cause of action, arising in the lifetime of the testator or intestate, and the defendant plead the general issue, or any other plea in bar, the plaintiff's character of executor or administrator is admitted.

**SAME—COSTS.**—If an executor or administrator, necessarily suing in his representative character, suffer a nonsuit in consequence of an illegal instruction, given by the court to the jury against his right to recover, he is not liable for costs *de bonis propriis*.

**ERROR** to the *Hendricks* Circuit Court. The plaintiff suffered a nonsuit in the Circuit Court, and a judgment was thereupon rendered against him for costs *de bonis propriis*.

**M'KINNEY, J.**—This is an action of assumpsit brought by an administrator, before a justice of the peace, for the recovery of a debt due to the intestate in his lifetime. The defendant pleaded, 1, *nil debet*; 2, that he never had or received the said sum of money; 3, that he never had or received the said sum of money or any part of it, and that he had long since paid over the same to the legal representatives of the intestate. Judgment was rendered by the justice in favour of the plaintiff, and an appeal taken to the Circuit Court. In that Court the case was submitted to a jury; and a bill of exceptions, taken during the progress of the trial, shows that after the plaintiff had given testimony, but not to prove he was the legal administrator of the intestate, the defendant moved the Court to instruct the jury as in the case of a nonsuit, that the plaintiff could not recover on the trial of the issues, without proving that he was the legal administrator; that the Court gave the instruction, and in consequence of it the plaintiff suffered a nonsuit.

Two errors are assigned: 1st, in giving the instructions asked by the defendant; 2d, in rendering judgment for costs against the plaintiff to be levied *de bonis propriis*. The cause of action is shown by the plaintiff to have arisen in the lifetime of the intestate, and the defense relied upon does not

reach the representative character in which the plaintiff sued, but applies exclusively to the cause of action. The law is well settled, that if an executor or administrator sue on a cause of \*action arising in the lifetime of the testator or intestate, the general issue, or a plea in bar, is an admission that the plaintiff is such executor or administrator. 2 Phill. Ev., 290; 2 Stark. Ev., 315; *Childress, ex'r, v. Emory, ex'r*, 8 Wheat. R., 642; *Peake's Ev.*, 343; *Gidley v. Williams*, 1 Salk., 37; *Kerley v. West*, 3 Litt. R., 362 (1). It is not thought necessary to notice, particularly, the pleas of the defendant, nor is it thought, however favourably viewed as relied on before the justice, that they amount to more than the general issue, or in bar; consequently, they admitted the plaintiff's representative character, and thus relieved him from the necessity of its proof. The parties would have stood differently, had the defendant, instead of the pleas relied on, pleaded *ne unques administrator*. Then the action could only have been sustained on proof of the plaintiff's being the legal representative of the intestate, and the instruction given by the court would have been substantially correct.

Had the plaintiff sued in his individual capacity, however erroneous may have been the proceedings in the Circuit Court, by suffering a nonsuit, he would have waived all right to object to such proceedings, and have been without relief. The plaintiff, however, has sued as administrator, of necessity, and his liability for costs must depend on the circumstances attending the nonsuit. If the nonsuit was compulsory, growing out of instructions which should not have been given, and which were decisive of the plaintiff's right to recover, the suffering a nonsuit should not be regarded as such willful default as to subject him to costs.

The connection between the instructions given, and the rendition of judgment for costs, has rendered an examination of the first error assigned material, to determine the weight to which the second error assigned is entitled.

The cause of action originated in the lifetime of the intestate, and the administrator could only bring the action in his repre-

sentative character. In *Harrison, adm'r, v. Warner*, 1 Blackf. R., 385, this Court, on the authority of numerous cases cited, took the well-established distinction between an action brought necessarily *in auter droit*, and when brought in an individual capacity. In the former, an administrator is not liable for costs unless he knowingly bring a wrong action, be guilty of willful default, or fail to prosecute his suit. In the latter, liability attaches.

[\*241] \*In the case before us, the action was appropriate, and necessarily brought in the representative character; nor can willful default, or voluntary failure to prosecute the suit, be charged against the defendant. The Court instructed the jury, that a verdict must be found for the defendant, in consequence of the plaintiff's having failed to prove he was the legal administrator. This proof we have seen, was not necessary, and the nonsuit suffered must be considered compulsory, since the only consequence of awaiting a verdict, would have been the additional costs of the jury.

We are therefore of opinion, that the instruction asked should have been refused. We also think the judgment erroneous as rendered for costs. The plaintiff individually was not responsible for costs, nor from the law, do we believe a judgment for costs against a party *in auter droit* is warranted.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. B. Ray* and *J. Eccles*, for the plaintiff.

*W. Quarles* and *H. Gregg*, for the defendant.

(1) See *Weathers v. Newman*, Vol. 1, of these Rep., 232. and note.

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#### ADAMS v. LISHER.

**MALICIOUS PROSECUTION—EVIDENCE.**—The declaration in an action of malicious prosecution, only professed to set out the substance of the prosecution, which was for a misdemeanor. *Held*, that the record of acquittal



## Adams v. Lisher.

could not be objected to as evidence, for a variance in a mere matter of form, between it and the proceedings stated in the declaration.

SAME.—The transcript of a record of the District Court of the *United States* for this State, under the seal of the Court, and certified by the clerk to be a complete copy of the record; is admissible as evidence in the Courts of this State.

SAME.—If, in an action of malicious prosecution, the plaintiff be proved guilty of the offense for which he had been prosecuted, he cannot recover, though his guilt was not known to the defendant at the commencement of the prosecution

ERROR to the *Shelby* Circuit Court.

STEVENS, J.—*Lisher* declared against *Adams* for a malicious prosecution. The declaration contains two counts. [\*242] The first \*count in substance charges, that *Adams* falsely, maliciously, and without any probable or reasonable cause, prosecuted *Lisher*, in the District Court of the *United States* for the district of *Indiana*, in an action of trespass for cutting timber on the land of the *United States*; and caused a writ of *capias ad respondendum* to issue thereon, out of said court, against him; and caused him to be taken into custody and imprisoned by the marshal of the district, and kept and detained in custody and prison, by the marshal, for the space of one day; that at the end of that time, he was duly discharged out of custody and prison, and fully acquitted, &c. The second count is in substance like the first, only it is averred that the defendant was compelled to appear before the District Court and answer to the action; and that the Court, after hearing, adjudged and determined that he was not guilty of the trespass, and discharged and acquitted him, &c. An issue was joined on the plea of not guilty, which was tried by a jury, and a verdict and judgment rendered for the plaintiff.

It appears of record by a bill of exceptions, that the plaintiff offered in evidence to the jury, to support his declaration, a certain transcript of a record of said District Court, under the seal of said Court, and certified by the clerk thereof in these words: "I, *Henry Hurst*, clerk of the court aforesaid, do hereby certify that the foregoing is a full, true, and complete copy of the record in the above entitled cause, as the same

remains of record ;" to the introduction of which the defendant objected, but the objection was overruled and the transcript was received as evidence. It also appears of record by another bill of exceptions, that the plaintiff asked the Court to charge the jury, that although the plaintiff was guilty of cutting certain poplar trees on the land in the declaration mentioned, yet if that fact was unknown to the defendant at the time he caused the action of trespass to be commenced, the prosecution was malicious, and the prosecutor was liable to the plaintiff in this action for a malicious prosecution. To this instruction the defendant objected, but the objection was overruled and the instruction given as asked.

The counsel for the plaintiff in error has raised several questions for the consideration of this Court.

The first question is, whether the declaration contains a sufficient cause of action? The declaration is not [\*243] very aptly or \*technically drawn, but we think it is substantially good. If, however, it is not strictly good, the objection comes too late: it contains a sufficiency to sustain the proceedings, after a trial by jury on the merits.

The next question is, did the court err in permitting the transcript of the record of the *United States* District Court to go to the jury in evidence? The transcript is, by the bill of exceptions, spread upon the record, and is correctly before us.

The first objection raised to show its inadmissibility as evidence is, that there are variances between it and the record described in the declaration which ought to exclude it. This objection, as to the matter of fact, is true; it evidently appears that there are variances between some of the allegations in the declaration and the transcript, but it does not follow of course that it should have been for that excluded. In actions of this sort, the proceedings in the prosecution of the suit should be stated correctly, and the charge against the plaintiff, and the judicial proceedings thereon, should also be stated as they exist, so as to correspond with the facts, and with the record of acquittal: and if the prosecution is for a felony, the allegations can only be proved by the record; but if it is a civil suit,

or a prosecution for a mere misdemeanor, the strictness in the pleadings is much relaxed, and the allegations may generally be proven by other evidence, unless the declaration is special, referring to the proceedings as they remain of record. 1 W. Bl. Rep., 385; 1 T. R., 493; 2 Saund. Pl. & Ev., 199. The prosecution or suit on which this action is bottomed stands on the foot of a mere misdemeanor; the allegations in the declaration are general, setting out the substance only of the proceedings, and do not refer to the proceedings as they remain of record; and as the points of variation are not matters of material substance, the transcript as to that objection was correctly admitted. 2 Chitt. Pl., 300, note d; 5 Price, 540; 2 Saund. Pl. & Ev., 188.

The next objection to the transcript is that it is not sufficiently authenticated. A record of a District Court of the *United States* is not within the statute of the *United States*, prescribing the mode in which the records and judicial proceedings of the State courts shall be authenticated. This State has no statute which we think meets the case, and, therefore, we must decide upon the sufficiency of the evidence upon some [\*244] \*reasonable and fixed rule. The mode in which this transcript is certified is the ordinary mode of certifying domestic records in use in the several States, instead of the technical exemplification. We are of opinion that the authentication is sufficient, and that the evidence was correctly received. Such is the rule in the State of *New York*. *Pepoon v. Jenkins*, 2 Johns. Cas., 119.

The last error complained of, is the instruction of the Court to the jury, that although the plaintiff was guilty of cutting some poplar trees on the land in question, as charged in the declaration, yet, if that fact was unknown to the defendant at the time he caused the action of trespass to be commenced, the prosecution was malicious, and the defendant was liable to the plaintiff for a malicious prosecution. The grounds of this action are malice, either express or implied, and the want of probable cause; both must exist, or the action can not be maintained. From the want of probable cause, malice may be

implied; but the want of probable cause can never be implied from the proof of malice. The direct proof of the most intense malice is not sufficient; there must be proof also of the want of probable cause, or the suit must fail. The want of probable cause is never implied. There is a distinction between malicious arrests in civil suits between individuals prosecuted for the private benefit of the plaintiff and a malicious prosecution of an offense, misdemeanor or wrong which affects the public. In the latter case, the prosecutor is much more favoured than in the other. It is a rule of law which seems to be founded on principles of policy, convenience, justice, and necessity, that the prosecutor of a wrong that affects the public shall be protected, provided he has probable cause, however malicious his private motives may have been; for although he may have intended ill, still good may arise to the public. 1 T. R., 493; *White v. Dingley*, 4 Mass. R., 433; *Lindsay v. Larned*, 17 Mass. Rep., 190; *Vanduzor v. Linderman*, 10 Johns. Rep. 106; 2 Stark. Ev., 911; 2 Wils., 302; 2 Saund. Pl. & Ev. 195; 1 Sw. Dig., 491.

This suit is founded on a prosecution set on foot by the defendant against the plaintiff, for a wrong that affects the public, and, therefore, the defendant stands on the footing of the most favoured class of prosecutors. It was an action of trespass for cutting and carrying away from lands belonging to the public, timber, that is to say, two poplar trees, [\*245] and one hickory tree, &c. \*The gist of that action was the trespass, and proof of cutting and carrying away any one of those trees, would be sufficient to sustain the action; and if he were guilty of the trespass, he cannot maintain this action, although he may have been acquitted in the District Court, where he was prosecuted; and it is immaterial whether the defendant knew him guilty or not, if he can now prove the fact that he was guilty, or if he can even prove that there was probable cause to suspect him of being guilty, it is sufficient for him.



## Dugan and Another v. Vattier and Another.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

W. W. Wick, for the plaintiff.

C. Fletcher, for the defendant.

## DUGAN and Another v. VATTIER and Another.

**FRAUDULENT CONVEYANCE—VENDOR AND PURCHASER.**—A debtor to defraud his creditors, conveyed his real estate to a person with notice of the fraud. *Held*, that a *bona fide* purchaser, for a valuable consideration, from the fraudulent grantee,—having paid the purchase-money, and received a deed, before notice of the fraud,—will hold the estate against the creditors of the grantor. *Aliter*, if the purchaser from the fraudulent grantee had notice of the fraud, before the payment of all the purchase-money (a).

**SAME—PARTIES.**—The creditors of a deceased debtor, having obtained separate judgments against his administrator, may unite in a bill in chancery to set aside the intestate's fraudulent conveyance of real estate, and subject it to the payment of their judgments

## ERROR to the Dearborn Circuit Court.

**BLACKFORD, J.**—*William Burke and Charles Vattier* filed a bill in chancery against *Thomas Dugan, Elias Conwell*, and others, in the Dearborn Circuit Court.

The bill charges, that *James Conn* in his life-time was indebted to each of the complainants; that since *Conn's* death, the complainants have obtained judgments against his administrator for their respective claims; and that there is no personal property to satisfy the judgments. It is also charged, that, pursuant to a corrupt agreement between *Conn* and *Dugan*, a conveyance of all *Conn's* real estate was executed by [246] him to *Dugan*, without consideration, for the purpose of defrauding the complainants and others, the creditors of *Conn*. It is further charged that *Conwell* fraudu-

(a) *Parkinson et al. v. Hanna*, 7 Blackf., 400; *Scott v. Purcell et al.*, Id., 66. See *Lewis et al. v. Phillips*, 17 Ind., 108; *Welby v. Armstrong*, 21 Id., 489, and cases there cited.

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lently purchased a part of the land from *Dugan*, with notice of the fraud in *Dugan's* title. The object of the bill, is to obtain a decree subjecting the land in question to the debts of *Conn*.

All the material charges in the bill are denied in the answers of *Dugan* and *Conwell*.

The following are believed to be the facts:—In 1820, *Conn*, being indebted to various persons in a much greater amount than his property was worth, conveyed all his real estate to *Dugan*, without any consideration, for the express purpose of fraudulently securing it, for his own use, from the demands of his creditors. At the date of this conveyance, *Conn* owed the debt now demanded by *Burke*, to the person from whom *Burke* obtained the right to it. After that time, *Conn* became indebted to *Vattier*. In 1825, *Dugan* sold and conveyed a part of the land to *Conwell* for \$300. *Conwell*, after having paid \$200 of the purchase-money, received notice of the fraudulent title under which *Dugan* claimed. The residue of the purchase-money still remains unpaid. Since these transactions, *Conn* being dead, judgments have been obtained by *Vattier* and by the person under whom *Burke* claims, for their respective debts, against *Conn's* administrator.

Upon these facts the Circuit Court decreed in favour of the complainants against *Dugan* and *Conwell*.

There can be no doubt respecting the correctness of the decree in this case, except as it regards the title of *Conwell*. It is contended by him, that as his deed was executed, and two-thirds of the purchase-money paid, before notice of the fraud, his title cannot be impeached. This is a case in which a debtor makes a deed to defraud his creditors, and the fraudulent grantee sells the land to a third person. We have a statute which expressly declares the original deed, in such a case, to be absolutely null and void; and it is a question which has excited great interest, whether such a fraudulent grantee as *Dugan* is, can, consistently with the provisions of a statute like ours, convey to any person, under any circumstances, a valid title to the premises. That he cannot do so, is decided

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by the Supreme Court of *Connecticut*, in *Preston v. Crofut*, 1 Day, 527, note; and by the Court of Chancery in [\*247] *New York*, in *\*Roberts v. Anderson*, 3 Johns. Ch. Rep., 371. But a decision, directly to the contrary, has since been made by the Court of Errors in *New York*, in *Anderson v. Roberts*, 18 Johns. R., 515; and by the Circuit Court of the *United States* in the First Circuit, in *Bean v. Smith*, 2 Mason, 252.

If we concurred in opinion with the Supreme Court of *Connecticut*, and the Court of Chancery of *New York*, that opinion would put an end, at once, to the question of notice in the case before us. We should then consider that *Conwell* could have no claim to the premises under his deed from *Dugan*, even if all the purchase money had been paid by *Conwell*, previously to his notice of the fraud. The contrary opinion, however, as expressed in the cases of *Anderson v. Roberts*, and *Bean v. Smith*, to which we have referred, appears to us to be the most reasonable, and to comport best with the spirit of the common law and of the statute. It becomes necessary for us, therefore, to determine what effect the notice, received by *Conwell* whilst one-third of the purchase-money was unpaid, has upon the validity of his title. The most that he can ask, under a statute which declares his grantor's title absolutely void, is to be placed upon the same footing with the purchasers of real estate, for which some other person, at the time of the purchase, has an equitable title.

The question, as to the effect of a notice of a prior equity, is not a new one in this Court. It was discussed here several years ago, and an opinion then expressed, that unless the deed be executed and the purchase-money paid, before notice, the prior equity must prevail. *Gallion v. M'Caslin*, November term, 1820. So, also, it was held by this Court at the last term, that a party cannot be considered as an innocent purchaser, if, after the purchase, but before payment of the purchase-money, he receive notice of the prior equity. *Hunter v. Holcroft et al.* The same doctrine is laid down by Mr. Sugden. His language is as follows: "Notice, before actual payment of all the money,

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although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract." Sugd. on Vend., Phila. ed. of 1820, p. 530.

That the deed must be executed before the receipt of the notice, is decided in *Wigg v. Wigg*, 1 Atk., 382; and that the purchase-money must be paid before the notice, is decided in [\*248] *Harrison v. Southcote*, 1 Atk., 528; in *Story v. Lord Windsor*, 2 Atk., 630, and in *Tourville v. Naish*, 3 Peere Williams, 307. We have been referred by the counsel of *Conwell*, for a contrary opinion, to the case of *Youst v. Martin*, 3 Serg. & Rawle, 430. The previous decisions, however, which we have cited, must govern the case before us. It is our opinion that the transaction between the fraudulent grantee and the purchaser from him, must be completely closed, by the payment of all the purchase-money and by the execution of the deed, before the notice, or the purchaser cannot hold the property from the original grantor's creditors, whom the original grantor and grantee have attempted to defraud (1).

It is objected by the plaintiffs in error, that the complainants, having distinct demands, should have brought separate suits. That objection is answered by the case of *Brinkerhoff v. Brown*, 6 Johns. Ch. Rep., 139.

STEVENS, J., having been of counsel in the cause, was absent.

*Per Curiam*.—The decree is affirmed with costs.

*J. Sullivan*, for the plaintiffs.

*G. H. Dunn* and *D. J. Casswell*, for the defendants.

(1) This question has been decided, in accordance with the case in the text, by the Court of Appeals of Virginia. *Carr and Green, Js.*, held, that to sustain the plea of a purchaser without notice, the party must be a complete purchaser before notice; that is, he must have obtained a conveyance, and paid the whole of the purchase-money. *Carr, J.*, refers to most of the authorities cited in the text, and also to *Moore v. Mayhow*, 2 Freem., 175; *Jones v. Stanley*, 2 Eq. Cas. Abr., 685; *Jerrard v. Saunders*, 2 Ves. jr., 454; Mitf. Pl., 215, 16; *Hardingham v. Nicholls*, 3 Atk., 304; 2 Newl. Eq., 145; and Beame's Pl., 247. He concludes by saying: "I cannot see how a defendant can, in the character of purchaser without notice, avail himself of payment of a part of the purchase-money, though paid before notice, and have a decree of the Court



## Haworth v. Fisher.

that such payment should constitute a lien on the land: it is not at all within the issue: it does not make him a *purchaser without notice*: and without this, he cannot interfere with the prior lien. Suppose, instead of *part*, he had paid the *whole* of the purchase-money, but got notice before he had a deed; he would surely have as much right to have the *whole*, as a *part*, made a lien on the land; and this being the full value of the land, would wholly disappoint the prior incumbrancer. I am clearly of opinion, therefore, that the purchaser must show, that he had paid the *whole* consideration before notice, in order to protect his purchase."

*Cabell*, J., dissented, saying that the purchaser should be protected to the extent of his payment. The other two judges were absent. *Doswell v. Buchanan's ex'rs.*, 3 Leigh, 365.

There is, also, the following recent case on the subject, in the *United* [\*249] *States'* \*Circuit Court, first circuit. A bill in equity was brought to set aside a conveyance asserted to have been procured by fraud. One of the defendants pleaded, that he was a *bona fide* purchaser under the grantee of parcel of the premises, without notice of the asserted fraud, and that he had paid a part of the consideration-money, and that the residue was secured by mortgage. *Held*, that this plea furnished no bar to the bill; that it should have averred, that the *whole* consideration of the purchase had been paid, before notice of the plaintiff's title. *Wood v. Mann*, 1 Sumner, 506.

## HAWORTH v. FISHER.

**CONTRACT—ASSIGNMENT.**—*A* entered into a written contract with *B* and *C*, by which he agreed to deliver them a number of hogs, at a specified time and place, for a certain price; and *B* and *C* then advanced to *A* a certain sum of money in part payment for the hogs. *Held*, that *B's* assignment of his interest in the contract to *C*, would not enable the assignee to sue at law, in his own name, either for a breach of the contract, or for the money advanced.

**DEMURRER.**—A demurrer to the whole declaration containing more than one count, cannot be sustained if one count is good.

ERROR to the *Wayne* Circuit Court.

**STEVENS, J.**—On the 4th day of *November*, 1830, a contract was made by and between the plaintiff in error, *Dillon Haworth*, of the one part, and the defendant in error, *Jacob R. Fisher*, and one *William Gentry*, of the other part, by which contract

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it was agreed and promised by the parties in substance, as follows, viz:—*Haworth* was to deliver to *Fisher & Gentry* a large number of hogs of a certain description, at a given time and place, &c., for which *Fisher & Gentry* were to pay him on delivery a certain price in money, and did then and there pay to him the sum of seventy dollars, towards the payment thereof. All of which were reduced to writing and signed by *Haworth*.

Afterwards, and before the time for the delivery of the hogs had arrived, *Gentry* made on the back of the aforesaid written contract, so signed by *Haworth*, the following endorsement, to wit: "For value received, I assign all my right, title, claim, and interest, of the within contract, over to *J. R. Fisher*." Afterwards, *Fisher* brought an action of assumpsit in his own name, as assignee of *Gentry* against *Haworth* on said [\*250] written contract. \*The declaration contains two counts:—1st, a count as assignee on said written contract, assigning as a breach thereof, the non-delivery of the hogs, &c.; 2d, a general count, in his own right, for money had and received, and for money lent and advanced. A jury trial was had, and a verdict and judgment rendered for the plaintiff, on the plea of *non-assumpsit*. Two special pleas were also filed, but they were demurred to, and the demurrers sustained.

It appears of record, by a bill of exceptions, that the defendant moved the Court to instruct the jury, "that the plaintiff in this suit could not recover the money advanced on said written contract by him and his partner *Gentry*;" which instruction the Court refused to give; and instructed the jury, that the plaintiff could recover the money, so advanced by the said plaintiff and his said partner, on said written contract; to which the defendant excepted.

Several errors are assigned for the reversal of the judgment of the Circuit Court, but this opinion will be confined to two of them only.

The first question is, can one of two joint obligees in a contract like the one before us, where both parties are obligors

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and both obligees, assign his interest to his co-obligee, so as to enable him to maintain an action at law, in his own name, on the written contract, without joining the name of his co-obligee? The Court thinks that this cannot be done. The obligation in question is very different from an obligation in which one party is simply obligor and the other party obligee. In this contract, *Fisher & Gentry* are obligees to receive the hogs, but are obligors to pay the money for them; so, in like manner, *Haworth* is obligor to deliver the hogs, but obligee to receive the purchase-money for them. Both parties are obligors and both are obligees. It is presumed that it cannot be contended, that this assignment of *Gentry's* to *Fisher*, would have prevented *Haworth* from maintaining a suit against *Fisher & Gentry* both, if he had met with any damage under the contract, by the defalcation of *Fisher & Gentry*, or either of them. If, then, *Gentry* could not divest himself of the character of obligor, by the assignment, he certainly could not divest himself of the character of obligee. The contract was entire, and could not be divided without the assent of *Haworth*.

But, if we were to lay the peculiar features of this [\*251] contract \*aside, and view the case abstractly upon general principles, it is, to say the least of it, very doubtful whether any instrument in writing can be transferred by assignment, in part only, so as to enable the assignee to bring suit in his own name. *Bibb v. Skinner*, 2 Bibb, 57; *Hubbard v. Prather*, 1 Bibb, 178; 1 Ld. Raymond, 360; Salk., 65; Kyd on Bills, 109.

The demurrer to the defendant's pleas would have reached the declaration, and settled the case finally against the plaintiff, had there been but the one count in the declaration: there are however two counts, and the second count is good; and the doctrine is well settled, that a demurrer to the whole declaration cannot be sustained, if there be one good count.

The next point is, the instruction of the Court, above noticed, to the jury. This instruction is wrong, and vitiates the verdict.

Armstrong v. Smith.

*Per Curiam.*—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*O. H. Smith and J. Rariden, for the plaintiff.*

*M. M. Ray, for the defendant.*

### ARMSTRONG v. SMITH.

**PRINCIPAL AND AGENT—DEMAND.**—An agent is not liable to a suit for money collected for his principal, unless it have been previously demanded (a).

**ERROR** to the *Wayne* Circuit Court.

**BLACKFORD, J.**—This was an action of assumpsit by *Armstrong* against *Smith*. The declaration states, that in consideration that the plaintiff would assign and deliver to the defendant certain accounts for collection, the defendant promised to endeavor to collect the same, and pay over the money to the plaintiff whenever requested. It states further, that the plaintiff did accordingly assign over to the defendant certain notes, and did deliver to him certain accounts, to be collected for the plaintiff's benefit. It also stated, that the defendant has collected, on the said notes and accounts, a certain sum of money, which he has neglected and refused to pay to the plaintiff, although often requested to do so. To this \*252] declaration the \*defendant demurred, and assigned as a cause of demurrer, that there is no request specially laid, for the payment of the money collected. The judgment of the Circuit Court, on the demurrer, is in favour of the defendant.

This appears to us to be a plain case. The declaration shows that the defendant collected the money, for which the suit was brought, as the agent of the plaintiff. To entitle a party, under such circumstances, to recover, he should aver and prove a demand of the money previously to the commence-

(a) *Philips v. Wills*, 2 Ind., 325; *Hannum v. Curtis*, 13 Ind., 206.



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ment of the suit. It would be unjust, and contrary to the implied contract between the parties, in cases like the present, to subject the agent to a suit for the money collected by him for his principal, without a previous demand.

It is decided, that in an action against a factor for the proceeds of goods sold on commission, the plaintiff must aver and prove a previous demand of an account. *Topham v. Braddick*, 1 Taunt., 572. So, also, where a man was authorized by another to sell a tract of land for his principal, and collect the purchase-money for him, it was held that the agent was not liable to an action for the money collected, until after it had been demanded. The Court there says, that it is sufficient, in such a case, for the agent to keep the money safely, and pay it according to the request of the party entitled to demand and receive it. *Williams v. Storrs*, 6 Johns. Ch. Rep., 353, 358. There are other cases, also, in which it is expressly decided, that an action will not lie against an attorney or an agent for money collected by him, unless a demand have been made for it before the commencement of the suit. *Taylor v. Bates*, 5 Cow. Rep., 376, 379; *Rathbun v. Ingalls*, 7 Wend. Rep., 320.

In the case now under our consideration, the money for which the suit was brought, is shown by the declaration to have been collected by the defendant, in the capacity of an agent for the plaintiff. The consequence is, that, according to the authorities to which we have referred, the declaration should have averred specially, that the money had been demanded of the defendant, previously to the commencement of the action against him. The demand was traversable, and should have been, therefore, specially alleged. That being the case, the declaration before us, averring no other request than the *licet sæpius requisitus* in the conclusion, is insufficient on special demurrer; and the judgment of the Circuit [\*253] Court, sustaining the \*demurrer because a special request was not alleged, must be correct.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Rariden*, for the plaintiff.

*O. H. Smith*, for the defendant.

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Barnes v. Modisett and Others.

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**BARNES v. MODISETT and Others.**

**DESCRIPTIO PERSONÆ.**—A note payable to *A*, administrator of *B*, is due to *A* in his own right; and he may sue on it without naming himself administrator.

**SAME.**—If, in such case, the suit be in the name of *A*, administrator of *B*, the words, "administrator of *B*" may be considered as surplusage (*a*).

**APPEAL—PRACTICE.**—An appeal from the judgment of a justice to the Circuit Court will be dismissed, if the transcript be not filed with the clerk within twenty days after the filing of the appeal bond (*b*).

**ERROR** to the *Vigo* Circuit Court.

**STEVENS, J.**—The facts in this case necessary to be noticed, are these: On the 18th of *June*, 1830, *Charles B. Modisett*, *Enoch Dole* and *James Wolfe*, made their promissory note in writing, payable to *James Barnes*, by the name and description of *James Barnes*, administrator of *L. Franklin*, deceased, by which they promised to pay to said *Barnes*, twelve months after the date thereof, the sum of fifty-four dollars and twenty-five cents. After the note became due and payable, *Barnes* brought suit on it against the makers, before a justice of the peace, and on the 1st day of *November*, 1831, recovered a judgment thereon against them for the amount of the note, interest, and costs: from which judgment the defendants appealed to the Circuit Court, and on the 29th day of *November*, 1831, filed their appeal-bond with the justice of the peace. Afterwards, on the 15th day of *February*, 1832, the transcript of the judgment and proceedings had in the case before the justice of the peace, together with the note and papers of the case, were filed in the clerk's office of the Circuit Court.

Afterwards, at the first term of the Circuit Court after the filing of the transcript and papers, on the calling of the cause on the docket, *Barnes*, the plaintiff, moved to dismiss [\*254] the appeal, \*because the transcript and papers had not been filed within twenty days after the appeal-bond

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(*a*) *Shepherd et al. v. Evans*, 9 Ind., 260.

(*b*) . *Peters v. Land*, 5 Blackf., 12.

was filed before the justice of the peace, as is required by the statute; which motion the Court overruled. The defendants then moved the Court to dismiss the action of the plaintiff, for want of jurisdiction in the justice's court to hear and determine the same, because the plaintiff was an administrator; which motion the Court sustained and dismissed the action, and rendered judgment in favour of the defendants for costs, &c.

The first question in this case is, whether the Circuit Court committed an error in dismissing the plaintiff's action?

We think it did. This debt is due to the plaintiff in his personal capacity, and not *in autre droit*, and he might have sued in his own right, without describing himself administrator, &c., and his having named himself administrator, &c., in the note and in the action, was surplusage, and should be rejected as such. 1 Blackf. Rep., 177, note; *Talmage, adm'r, v. Chapel*, 16 Mass., 71; *Biddle, adm'r, v. Wilkins*, 1 Peters, 686. The motion to dismiss the action should have been overruled (1).

The next question is, whether the Circuit Court should have dismissed the appeal as moved for by the plaintiff?

We think the appeal must be dismissed. The 72d section of the act defining the powers and duties of justices of the peace, Rev. Code of 1831, requires that the transcript of the judgment and record of the justice of the peace, together with the cause of action, appeal-bond, and papers of the case, shall be filed in the Circuit Court, within twenty days after the appeal-bond is filed before the justice of the peace. In this case, more than twenty days had elapsed before the transcript and papers were filed in the Circuit Court (2).

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Whitcomb*, for the plaintiff.

*J. Farrington*, for the defendants.

(1) Suits may now be brought in a justice's court, by executors or administrators, for causes of action arising in the time of their testators or intestates. See note to *Simonds v. Colvert*, Vol. 2 of these Reports, 413.

(2) *Brown v. Modisett*, May term, 1834, post, accord.

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Pegg and Others v. The Treasurer of Fountain County.

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## [\*255] \*PEGG and Others v. THE TREASURER of Fountain County.

**OFFICIAL BOND.**—A constable's bond was given to "the Treasurer of *Fountain* county," and a suit on it brought in that name. *Held*, on demurrer to the declaration, that the action could not be sustained.

**SAME.**—The bond, in such case, should be to the county treasurer by name, and the suit in the name of the person who is treasurer when it is instituted.

ERROR to the *Fountain* Circuit Court.

STEVENS, J.—*Joab Pegg, Richardson Wilkinson, Ebenezer Franklin, and William C. Miller*, made their joint and several bond in the penal sum of \$500, payable to the treasurer of *Fountain* county, conditioned that *Pegg* should well, truly, faithfully, and impartially, discharge the duties of constable. On this bond the treasurer, by the artificial name of treasurer, on the relation of *Edward Mace*, brought an action of debt. A demurrer, setting out specially the causes of demurrer, was filed to the declaration, on which an issue in law was joined. The court overruled the demurrer, and rendered judgment for plaintiff.

Four causes of demurrer are set out, but this opinion will be confined to the first.

The first cause of demurrer is, that the name of the person who filled the office of treasurer of the county at the time of making the bond and bringing the suit, does not appear upon the record; that the suit is brought in the artificial name of the treasurer of the county of *Fountain*; and that there is no corporation known to the laws of *Indiana* authorized to sue and be sued by the artificial name of "the treasurer of the county." The statute under which the bond in question in this suit was made, required constables to give bond with security, payable to the treasurer of the proper county, and his successors in office. It needs no argument to show that these bonds are not made payable to a corporation by its artificial corporate name. A corporation, by its corporate name, can have no successors in office. Its officers have successors in



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Pegg and Others v. The Treasurer of Fountain County.

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office, but the corporation itself can have none. Those bonds, and the suits brought on them, must be in the individual name of the person who fills the office of treasurer of the county at the time.

[\*256] \*No available contract can be made, or suit brought and maintained, except by some person able in law to contract and be contracted with, or to sue and be sued; and the law knows of but two kinds of persons, that is, natural and artificial, or, in other words, natural persons and corporations. The suit in this case appears to have been brought by neither. There is no such corporation or artificial person known to our laws as the "treasurer of the county," capable of contracting and being contracted with, or suing and being sued, by that corporate or artificial name.

As to this defect, the defendant in error insists that it can not be taken advantage of by demurrer; that it should have been pleaded in abatement to make it available. This, we think, is not correct. It is a general rule, to which there are few exceptions, that those matters and things which appear of record need not be pleaded. The object of pleading is to bring forward new facts which do not appear: the defect here complained of appears of record, and may properly be taken advantage of by demurrer.

We think this objection to the declaration fatal, and the demurrer should have prevailed.

*Per Curiam*.—The judgment is reversed. To be certified, &c.

*D. Wallace*, for the plaintiffs.

*I. Naylor*, for the defendant.

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Crouch v. Martin.

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## CROUCH v. MARTIN.

**VERDICT—DETINUE.**—A verdict in detinue was as follows: "We, the jury, find the property named in the declaration to be in the plaintiff, and find the value thereof to be sixty dollars." *Held*, that the judgment should be arrested, the verdict not showing an unlawful detainer of the property (a)

**APPEAL** from the *Fountain* Circuit Court.

**STEVENS, J.**—*Martin* declared against *Crouch*, in an action of detinue, for unlawfully detaining from him a certain gray mare, of the value of sixty dollars, of his proper goods and chattels, and to his damage \$100. An issue was joined on the general plea of *non detinet*, which was tried by a jury, [\*257] and a verdict \*found for the plaintiff in these words:

"We, the jury, find the property named in the declaration to be in the plaintiff, and find the value thereof to be sixty dollars," upon which the defendant moved in arrest of judgment, but the motion was overruled, and final judgment rendered on the verdict for the plaintiff.

The only question before this Court is, whether the verdict is sufficient to authorize the rendition of final judgment for the plaintiff?

The issue in the case is, whether the defendant unlawfully detained the property of the plaintiff as stated in the declaration? the *gravamen* of the issue is the detention. The plaintiff, to recover, had to prove three things,—1, property in himself; 2, an unlawful detention by the defendant; and 3, the value. The jury have found but two of those facts. They have found the property to be in the plaintiff, and its value; but the unlawful detention thereof, which is the main and principal point in issue, they have not found.

A verdict must answer all the material points in issue; but a general verdict, that in substance covers the whole, is sufficient; as in this case, if the jury had simply found for the plaintiff, and found the value of the property, &c., it would have been

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(a) *Wright v. The State ex rel.*, 8 Blackf., 385.

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 Mitchell v. Likens.
 

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sufficient; for the finding for the plaintiff would have been, substantially, finding property in the plaintiff, and the unlawful detention of it by the defendant; but as it is, it is wholly defective. The judgment should have been arrested (1).

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*A. S. White* and *I. Naylor*, for the appellant.

*D. Wallace*, for the appellee.

(1) When a judgment is arrested for defects in *the verdict*, a *venire de novo* must be awarded; that is, another jury must be summoned to try the issue. Gould on Pl., 526.

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 [\*258]

\*MITCHELL v. LIKENS.

JURY.—If the names of the petit jurors have not been recorded by the clerk, conformably to the statute, it is a good cause of challenge to the array.

APPEAL from the *Harrison* Circuit Court. *Likens* was the plaintiff in the Circuit Court, and *Mitchell* the defendant. Verdict and judgment for the plaintiff.

STEVENS, J.—There is but one objection raised to the record, judgment, and proceedings in this case, and that is exhibited in a bill of exceptions.

It appears that when the cause was called for trial in the Circuit Court, and the jury were about to be sworn, the defendant challenged the array for misconduct, neglect, or default in the clerk, in not having recorded the panel, as he is, by the first section of the act regulating the mode of "summoning and impanneling grand and petit jurors," of the 29th day of *January*, 1831, required to do; and that the Court overruled the challenge, and the jury were sworn.

We think that this challenge was well taken, and that it should have prevailed. It is settled in the case of *Jones v. The State*, decided at the *May* term, 1832, of this Court (1),

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 Mitchell and Others v. Denbo.
 

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that the array may be challenged and the panel quashed, for any partiality or default of the board doing county business, or of the clerk in selecting or arraying the panel. *Gardner v. Turner*, 9 Johns. Rep., 260; *Eaton v. The Commonwealth*, 6 Binn. Rep., 447.

We think it is one of the essential requisites of the statute, that the clerk, so soon as the several jurors' names are drawn and written on the panels to which they belong, shall record them without delay, and before any *venire facias* issues thereon, in the order book as required by the act.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*J. H. Farnham* and *H. P. Thornton*, for the appellant.

*C. Dewey*, for the appellee.

(1) *Ante*, p. 37.

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[\*259] \*MITCHELL and Others v. DENBO.

**DELIVERY BOND—DAMAGES.**—Debt on a bond for the delivery of goods taken in execution. *Held*, that if the value of the goods be sufficient to satisfy the execution, the plaintiff, in case of their non-delivery, shall recover the amount due on the execution, with interest and 10 *per cent.* damages.

**JURY.**—The names of the petit jurors must be recorded, as prescribed by statute, or the array may be challenged.

**APPEAL** from the *Harrison* Circuit Court. In this case *Denbo* was the plaintiff, and *Mitchell* and others the defendants, in the Circuit Court. Verdict and judgment for the plaintiff.

**STEVENS, J.**—This is an action brought on a delivery bond, for the delivery of certain goods and chattels to the sheriff at the time and place of sale, those goods and chattels having been, by the sheriff, seized and taken in execution on a writ of *fi. fa.*, and the breach assigned is the failure to deliver. The



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Mitchell and Others v. Denbo.

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whole proceedings and the bond are bottomed on the twelfth section of the act of 1831, subjecting real and personal estate to execution. In this case two errors exist.

The plaintiff, after he had proved that the goods and chattels which the obligors bound themselves to deliver were sufficient to satisfy the execution, moved the Court to instruct the jury that they must find the amount due on the execution, with interest, and also ten *per cent.* damages thereon; but the Court refused to give so much of the instructions asked as relates to the ten *per cent.* damages. This is error: the instruction should have been given. The statute will fairly bear that construction, standing alone, and when taken in connection with other statutes passed at the same session, and particularly the fifteenth section of the act respecting constables, it is clearly inferable that such was the intention of the Legislature. This instruction gives one uniform rule, equally applicable to every class of cases arising on such bonds. The other construction produces an incongruity for which we can see no good reason.

It further appears that when the jury were about to be sworn the defendant challenged the array for a default in the clerk in not having recorded the panel in the order book of the Circuit Court, as he is required to do by the [\*260] statute, and that the \*challenge was overruled. There is also error in this. The challenge should have prevailed. Vide *Mitchell v. Likens*, at this term of this Court.

*Per Curiam.*—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*I. H. Farnham*, for the appellants.

*C. Dewey*, for the appellee.

END OF MAY TERM, 1833.



ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1833, IN THE  
EIGHTEENTH YEAR OF THE STATE.

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HAGAR and Another v. MOUNTS.

**PLEADING—PRACTICE.**—Under a special plea not sworn to, denying the execution of a note, the same evidence is admissible as if it were supported by oath; the plea not having been objected to at the proper time (*a*).

**PRACTICE.**—If, in such case, there has been a trial before a justice, and another in the Circuit Court on appeal, without objection to the plea, the Circuit Court can not, on a new trial, reject the plea because it was not sworn to.

**FRAUD.**—A note payable to *D* was executed by *A* in the name of the firm of *A & B* without *B*'s knowledge, for a debt with which *B* had no concern: it was also, through *A* and *D*'s fraud, executed by *C* as the surety, as he supposed, of the firm of *A & B*. *Held*, that the transaction was a fraud upon both *B* and *C*, and that the fraud was a good defense, under the general issue, in an action against them on the note.

**APPEAL** from the *Bartholomew* Circuit Court. *Mounts* was the plaintiff below, and *Hagar* and *Hart* the defendants.

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(*a*) See *Hill et al. v. Jones*, 14 Ind., 389, and cases there cited; *Bradley v. The Bank, &c.*, 20 Id., 528.

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Hagar and Another v. Mounts.

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The suit was commenced before a justice of the peace, and was founded on a promissory note. The defendants pleaded specially. See *ante*, p. 57.

[\*262] \*M'KINNEY, J.—At the *May* term, 1832, this case was before us, and it was decided that the Circuit Court erred, in rejecting the testimony offered by the defendants in support of their pleas. In the opinion delivered, it was observed, “The plaintiff need not go to trial on the special plea, unless it be sworn to; but if he does, the same proof will be admissible as if the affidavit had been made. Considering the pleas in this case, therefore, as regularly before the Court, the evidence in their support, if it tend to show a valid defense, should not have been rejected.” The judgment of the Circuit Court was reversed, and the cause remanded.

The cause was subsequently reinstated in the Circuit Court, and on the motion of the plaintiff, the pleas which had been filed before the justice of the peace, and to which the above remarks were applied, were set aside. It also appears, by a bill of exceptions, that the Circuit Court refused permission to the defendants, the pleas being set aside, “to prove that the debt for which the note declared on was given, was a debt due by said *Wilson* and one *Benjamin F. Arnold*, formerly his partner; that the note now before the Court was given for the debt due by said *Wilson & Arnold*, before the partnership of *Wilson & Hagar*, and made and given without the knowledge or consent of *Hagar*; and that *Hart* had good reason to believe and suppose, he was going security for said *Wilson & Hagar*, when in truth and in fact, he was going security for *Wilson & Arnold*.” The rejection of the pleas, and the exclusion of the testimony offered, are assigned as error.

In the opinion delivered at the *May* term, 1832, this Court declared that testimony, such as was rejected, was admissible under the pleas, and constituted a bar to the action. Numerous authorities were cited in support of the position. It was also decided, that although the pleas denied the execution of the note, and by the statute, R. C., 1824, p. 292, should have been supported by affidavit, yet if the plaintiff waived the objection



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and went to trial, he was concluded, and the testimony, therefore, admissible. This cause originated before a justice of the peace, and on the trial in that court, judgment was rendered for the defendants. On the appeal to the Circuit Court, the exclusion of the testimony referred to, left the defendants without support to their pleas, and judgment was rendered for the plaintiff for the amount of the note. The judgment from which the present \*appeal has been taken to this Court, the pleas and testimony being rejected, was also for the plaintiff.

Upon the errors assigned, two questions arise: 1st, was the Circuit Court correct in rejecting the pleas? 2d, in the absence of the pleas, was the testimony offered, admissible?

The legislature appears to have thrown around the Court of a justice of the peace, every protection that can secure to that useful tribunal its full measure of benefit to the community, and, as a most effectual guard, has enacted "that on appeals to the Circuit Court, neither the written statement of the cause of action, nor defense of the parties, shall be set aside for want of form, but shall be acted upon without any substantial amendment or alteration whatever; and that the defendants shall have the benefit of the general issue, without pleading the same, except when it denies the execution of an instrument, the foundation of the action, when it must be verified by oath or affirmation." Recognizing as correct the opinion heretofore given of the pleas in this case, and regarding the statute as imperative, it would seem very clear that the Circuit Court was denied the power of setting aside the pleas. If the objection of the insufficiency of the pleas, they denying the execution of the note, the foundation of the action, had been made before the justice of the peace, in consequence of the absence of an affidavit of their truth, if such was the character of the pleas, the objection would have been good. No such objection, however, appears to have been made before the justice of the peace, or in the Circuit Court until the second trial of the cause. This was obviously a waiver of the

Clark v. Fraley.

formality of an affidavit. We think there was error in their rejection.

Upon the 2d question, we are equally clear that error was committed by the Circuit Court, in excluding the testimony offered. The testimony was a bar to the action, not because the note was not executed, but because *Hagar*, the partner of *Wilson*, was not liable to the plaintiff for a debt due to him by a former firm, of which *Hagar* was not a member, and because *Hart*, the surety in the note, by the fraud of the plaintiff and *Wilson*, signed the note as surety for *Wilson & Hagar*, when the note was given for a debt due by *Wilson & Arnold*. The fact, that the plaintiff knew that the debt was created by *Wilson & Arnold*, would be a bar to a recovery against *Hagar*, he having no knowledge of the execution of the note, [\*264] nor having assented \*to it, and the fraud upon *Hart* would equally protect him from liability.

The ground of the defense, under the general issue, was the fraud practiced by *Wilson* and the payee of the note, and as the testimony rejected by the Court would have established this fraud, it should have been admitted.

We therefore think that the Circuit Court erred, not only in setting aside the pleas, but in refusing to permit the evidence offered to be given.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*P. Sweetser*, for the appellants.

*W. Herod*, for the appllee.

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### CLARK v. FRALEY.

LANDLORD AND TENANT—DISTRESS.—A tenant contracted to deliver, as rent, one-third of the corn he should raise on the premises. *Held*, that the remedy by distress does not lie in such a case (a).

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(a) *Bowser et al. v. Scott et al.*, 8 Blackf., 86.

## Clark v. Fraley.

**APPEAL** from the *Tippecanoe* Circuit Court. The verdict and judgment, in this case, were in favour of *Fraley*, the plaintiff below.

STEVENS, J.—*Fraley* declared against *Clark* in an action of replevin, for unjustly and unlawfully taking and detaining divers goods and chattels, of him the said *Fraley*, of great value, &c.

*Clark* avowed the taking and detaining the goods and chattels as a distress for rent, &c., because, he says, that on the 15th day of *November*, 1830, he, the said *Clark*, by a certain article of agreement under the hands and seals of him and the said *Fraley*, demised to said *Fraley* part of his, said *Clark's* land, being the field south of the house of said *Clark*, containing fifty-one acres, and the corn-field west of the house of him, said *Clark*, excepting a small piece which was sown in rye, and four rods square at the grave-yard, together with the house and garden, which were occupied by *John S. Parsons*, for the term of one year from the 1st day of *March*, [265] 1831, then next ensuing, &c., that in \*consideration thereof said *Fraley* stipulated and agreed with him, said *Clark*, by said article of agreement, to put the whole of the two fields, except as therein excepted, in corn, and to deliver to said *Clark*, in his crib, &c., one-third part of said corn so raised, &c.; and because 1,000 bushels of corn, of the value of \$250, part of said rent, were then and there, &c., due and in arrears from said *Fraley* to him, said *Clark*, he took and detained the said goods and chattels, &c., as a distress for rent, &c.

To this avowry several pleas were filed, on which issues were joined to the country, and a jury trial had, &c. During the progress of the trial, *Clark*, the avowant, took several exceptions to evidence which the court permitted to go to the jury, and to instructions given, and instructions refused to be given to the jury by the court, all of which he caused to be spread of record by bills of exception.

*Clark*, the avowant, appealed, and now asks this Court to reverse the judgment of the Circuit Court, and set aside the

Clark v. Fraley.

verdict of the jury for these errors contained in his bills of exception. We, however, do not think it necessary to examine those bills of exception, or to determine whether the errors therein complained of exist or not, the appellant having committed the first error himself, and that error a fatal one. It is a principle long since settled, that where it appears of record that the plaintiff in error ought not to have a judgment in his favour, or that if he had obtained one, it must have been reversed on a writ of error brought by his adversary, he can not maintain one himself. *Elliott v. Fowler*, 1 Litt., 191, *Guthrie v. Wickliff*, 3 Bibb, 81. The avowry in this case is defective, and the defect is one that can not be cured: it is in the contract on which the avowry is bottomed. The written contract, set out in the avowry, does not authorize the appellant to avow the taking the goods and chattels as a distress for rent. The remedy by distress is an extraordinary one, in which a man becomes a judge in his own cause; a remedy by which a landlord is permitted to seize and dispose of the property of his tenant, without the assent of a court or a jury, and therefore he is limited to strict law; nothing can be taken by implication or intendment; he is confined strictly to the authority given.

A landlord has all the remedies by suit or suits that other creditors have, in addition to this remedy by distress, [\*266] and he is \*never bound to resort to this remedy, unless he please; and he never should do it unless he is certain of five things; that is, 1. That the contract between himself and his tenant authorized a distress for the rent; 2. That he has good and lawful cause to distrain; 3. That he has good and lawful right and authority to make the distress; 4. That the thing taken is distrainable; 5. That the distress is made at the proper time and place; for if he fail in any of those points, he becomes a trespasser.

In the cause now before us, the covenant between the parties on which the avowry is bottomed does not authorize a distress. No distress for rent can be legally made unless the amount of rent is reserved or stipulated by contract, and the sum is certain and specific. Other actions may lie, such as *assumpsit*,



## Clark v. Fraley.

debt, or covenant, but the landlord can not distrain. The rent stipulated to be paid in this case is entirely uncertain; the landlord's demand sounds solely in damages. Some years it may amount to \$250, in other years not to twenty dollars. The amount depends upon the seasons, winds, rains, storms, and elements, and also upon the industry and care of the tenant; nothing can be more uncertain than the amount of rent that may be annually due upon such a contract.

Kent says the remedy provided by law for the recovery of rent depends upon the nature of the contract. The suit may be covenant, debt, or assumpsit, or it may be by re-entry or distress. Baron Gilbert says that in that particular distress is in the nature of an execution, and it would lead to great abuse and oppression if the party could determine for himself the amount due to him. In the case of *Lansing v. Rattoone*, 6 Johns. Rep., 43, the Court says that the remedy is for a certain rent, and not for damages; that the landlord can not even calculate interest, and add it to the rent, because interest is in the nature of damages; he must distrain only for the naked rent. In the case of *Jacks v. Smith*, 1 Bay, 315, the Court says that there must be an express contract for rent, either written or parol, and the amount of rent must be certain. In the case of *Smith v. The Sheriff of Charleston*, 1 Bay, 443, the Court says no distress for rent can be made unless a specific sum be reserved by contract.

The rent for which a distress may be made may be payable in grain or other produce, or in repairs or labor, but the sum must be certain, and be stipulated by the contract. In [\*267] the case of *Smith v. Colson*, 10 Johns. Rep., 91, the Court decided that the rent might be payable in repairs if the contract settled and fixed the sum certain that should be so paid.

*Per Curiam*.—The judgment is reversed, &c., at the appellant's costs. Cause remanded, &c.

*C. Fletcher and W. M. Jenners*, for the appellant.

*A. S. White*, for the appellee.

Towsey, Assignee, v. Shook.

## TOWSEY, Assignee, v. SHOOK.

**ONUS PROBANDI.**—If the defendant, in an action on a note, rely on a plea of failure of consideration, or of fraud, the *onus probandi* lies upon him (a).

**SAME.**—If the alleged fraud, in such case, be in the sale of a patent right for which the note was given, the fraud must be proved, as in other cases.

## ERROR to the Dearborn Circuit Court

M'KINNEY, J.—Debt on a promissory note before a justice of the peace. The defendant pleaded: 1. *Nil debet*; 2. Failure of consideration through the fraud of the payee; 3. That the note was given to Gould, the payee, in part consideration of a supposed patent-right, Gould knowing he was not the patentee or assignee, and was without authority to sell the same, but falsely represented himself to be the assignee, and thereby induced the defendant to purchase. Judgment was rendered by the justice of the peace in favour of the plaintiff for debt, interest and costs.

On appeal to the Circuit Court, the cause was submitted to the Court, and judgment rendered for the defendant.

A motion for a new trial was overruled, and a bill of exceptions shows that, on the trial, the plaintiff introduced the note in evidence, which was read, and that the defendant called upon the plaintiff to answer under oath, which he did, and stated “that he believed the note was given in consideration of a sale of some interest in a patent right for the steam washing machine,” which was all the evidence given in the cause.

The case presents the single question: Upon which of the parties devolved the *onus probandi*?

[\*268] \*There are certain rules of evidence upon this point, to some of which it may not be improper to advert. Thus, “That the party who alleges the affirmative of any proposition, shall prove it.” 1 Stark. Ev., 376; Bull. N. P., 298; Roscoe on Ev., 51. “That the affirmative is always to be proved by those whose interest it is to prove it, and that

(a) *Rogers v. Worth*, 4 Blackf., 180.

Towsey, Assignee, v. Snook.

proof of that fact which operates in discharge of the other party, lies upon him." *Rees v. Hunter*, 4 T. R., 37, 38. "That in every case, the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant." "Where the presumption of law is in favour of the affirmative, as when the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it, although he must prove a negative, for the other party shall be presumed innocent until proved to be guilty." *Monke v. Butler*, 1 Roll. R., 83; *Marsh v. Horne*, 5 Barn. & Cress., 322; *Roscoe on Ev.*, 52.

The action is founded on a note, and as that imports a consideration, its production was all the evidence required on the part of the plaintiff, unless, indeed, its consideration was impeached, and rebutting testimony rendered necessary, from which it follows that unless evidence in support of a plea, impeaching the consideration, be adduced, the plaintiff may rest his case upon the note itself.

The second and third pleas are special, and present, as a defense to the action, failure of consideration, and fraud on the part of the payee. Fraud is never presumed, and proof is as necessary to establish it as is the averment of its existence as a defense. The matter relied upon in each plea is clearly affirmative, and to compel the plaintiff to disprove such averments would be a departure from those rules of pleading to which we have adverted. The ground of the defense is fraud, and upon its establishment the action is barred. As fraud is never presumed, it was obviously the duty of the defendant to prove it.

We will notice the proof adduced. The plaintiff on examination says: "He believes the note was given in consideration of a sale of some interest in a patent-right for the steam washing machine;" and here the evidence closed. This evidence does not support the second plea. Neither failure of consideration nor fraud is shown. If it have any  
[\*269] weight, it must be in its \*application to the third plea. The sale of an interest in a patent-right is not,

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Judah v. M'Namee.

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*per se*, evidence of fraud. The presumption of fraud being inadmissible, and it not being committed by the mere sale of an interest in a patent-right, unconnected with other acts by the vendor, if such acts occurred, their proof was necessary. If however, as contended, a plea averring fraud in the sale of a patent-right, throws the proof of a patent having issued, and the right to vend it, on the plaintiff, then there would appear some ground for the application of the evidence noticed to the third plea; but this is not admitted, nor do we perceive any difference between the sale of a patent-right and that of any other property. In the present case, if fraud was practiced in the sale, or a patent sold without title by the vender, evidence of this description should have been adduced by the defendant.

We therefore think a new trial should have been granted.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

G. H. Dunn, for the plaintiff.

D. J. Caswell, for the defendant.

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JUDAH v. M'NAMEE.

**PHYSICIAN—FEES.**—A physician may maintain an action for his fees.

**JURY.**—If it appear in the record that the jury were sworn, the omission of the words “the truth to speak in the premises,” can not be assigned for error (a).

**APPEAL** from the *Knox* Circuit Court. Verdict and judgment below for *M'Namee*, the plaintiff.

**STEVENS, J.**—*M'Namee* declared against *Judah* in *assumpsit*. The declaration contains three counts. The first two of these counts, after averring that *M'Namee* was then, and for divers years then last past had been, a doctor of physic, and had during all that time used and exercised the profession, art, and

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(a) 4 Blackf., 189; 10 Ind., 435.



*Judah v. M'Namee.*

business of a physician, declares that *Judah* is indebted to him in the sum of \$269.43, for work, labour, care and diligence done, performed and bestowed by him, as such doctor of physic, in visiting and prescribing physic, &c. The third count averred that *M'Namee* was then, and for divers years [\*270] then last past had \*been, an apothecary, and had for all that time carried on, used, and exercised the art, business, and profession of an apothecary; and that *Judah* is indebted to him in the further sum of \$260.43, for work, labour, care and diligence done, performed, and bestowed by him in healing and curing *Judah* and his family, &c., of divers wounds, sores, diseases and maladies.

The first two counts were demurred to, and the demurrer overruled by the Court. On the third count, an issue on the plea of *non-assumpsit* was made between the parties.

By the record, it appears that a jury of twelve good and lawful men were then empaneled to try the issue joined, and also to inquire of the damages sustained by the plaintiff, &c., who being sworn, upon their oaths say, &c., omitting the usual words "the truth to say in the premises," &c. A motion was made in arrest of judgment, which was overruled, and final judgment rendered on the verdict.

The objection to these counts is, that they are for a physician's fees, and that by the common law of *England*, no action will lie for the fees of a physician; that we have adopted the common law of *England*, and made it the rule of our decision, and unless we had a statute to authorize it, no such action can be maintained.

The general principle in *England* seems to be, that a physician can not maintain an action for fees. It was so decided by the Court of king's bench in 1791, after solemn argument. The point was, however, warmly opposed. The counsel who argued the case, said that there were no solemn decisions to that effect, and that there was no authority for it in the books. Lord *Kenyon*, however, so decided; but his lordship did not pretend to say that it was settled law, or that it was sustained by authority. He simply said, that it had been understood that

the fees of a physician were honorable and not demandable of right; that it was much more for the credit and rank of that honorable body that it should be so understood; and his lordship seemed to doubt whether the physicians would not disclaim a right, which would place them in society on a footing with common men (1).

It is true that we have adopted the common law of *England*, but it is a qualified adoption. We have only adopted so much of it, as is of a general nature and not local to that [\*271] kingdom, and \*not inconsistent with our own laws.

We have not adopted any part of it that is peculiar to that country, or that is contrary to, or inconsistent with, the spirit and practice of our own institutions. It is at least doubtful, whether the principle here contended for was any part of the common law, at the time the States of this *Union* dissolved their allegiance to that kingdom; but if it were, it is clearly a principle which is local to that country, and is inconsistent with the spirit and genius of all our institutions, and the practice of our Courts. Our institutions and laws are all based on the great and broad principles of liberty and equality, and know nothing about nobles and ignobles, honorables and common men. There is but one class known: all stand upon the same footing, and bow with equal submission to one common master: that is, the law of the land. We have no privileged orders known to the law, either as to suing or being sued. It was decided in *Pennsylvania*, in the case of *Mooney v. Lloyd*, 5 Serg. & Rawle, 416, that both by their practice and their statutes, a physician can maintain an action for his fees. Dane, in the first volume of his Digest, p. 619, says that a physician can maintain an action for his fees in *America*; and that it was so settled, after solemn argument, in the Supreme Judicial Court of *Massachusetts*, as early as the year 1789.

From this view of the case, we have no hesitation in saying that such an action is maintainable by our laws; and that it is and has always been the practice, not only of the courts of this State, but also of the several States of this *Union*. Such has always been the understanding of our legislative bodies. This

is evidenced by their having at several times passed acts prohibiting physicians from maintaining actions for their fees and medical prescriptions, unless they were licensed, &c.; which clearly implies that they could maintain an action for those fees and services, if they were not prohibited.

The next objection is to the oath of the jury. It is contended that it does not appear of record that the jury were lawfully sworn; that the omission of the words "the truth to speak in the premises," is a fatal defect. It is a principle as well settled as any other, that the oath of a juror should correspond with what he is sworn to do; and that the words "the truth to speak in the premises," apply to everything which a jury can be impaneled and sworn to do in a court [\*272] of justice. But other \*words may be used, as where a jury are simply sworn to try an issue, or to try issues, the oath may be "to well and truly try the issue," or "the issues;" or if they are sworn to assess damages, the oath may be to "well and truly inquire of and assess the damages," &c. But in all cases, it should appear of record that the jury were lawfully sworn. The books all say that if it does not so appear, such an omission is a material and fatal defect. The only difficulty in the case is, whether there is not enough appearing of record, to authorize us to presume that the jury were lawfully sworn? We had some doubts, but have concluded that it is safest so to presume. We think that if we do not so presume, we shall open a door that will produce much difficulty, and probably do great injustice to suitors.

A large majority of the Circuit Court clerks appear totally regardless of the manner in which they make their records; they not only lose sight of all form, but they leave out and confuse and mangle the material substance. They appear to have no clerical pride. The paper on which their transcripts are written, is frequently not even put together in the form of a transcript. Under such a state of things, we have supposed it best to pay as little regard as possible to everything that can fairly be presumed to be a clerical mistake or error.

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 Arnold v. Brown.
 

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*Per Curiam*.—The judgment is affirmed with costs.

*J. Whitcomb* and *S. Judah*, for the appellant.

*C. Dewey*, for the appellee.

(1) *Chorley v. Bolcot*, 4 T. R., 317. See, also, the case of an apothecary who, having passed himself off as a physician, sued for his fees, and was nonsuited. The Chief Justice, in that case, said: "If a person passes himself off as a physician, he must take the character *cum onere*. When he brings an action for visits paid by him as a physician, I will give him credit for being so, and tell him he must trust to the honor of his patients." *Lipscombe v. Holmes*, 2 Camp., 441.

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### CRAVEN v. UPDYKE.

UPON the trial of a cause in the Circuit Court, on appeal from the judgment of a justice of the peace, the plaintiff offered to examine, as a witness, the person who was his surety for costs, in the cause before the justice. *Held*, that the witness was interested in the event of the suit, and therefore incompetent.

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\*ARNOLD v. BROWN.

PROMISSORY NOTE—PLEADING.—A note for the payment of a certain sum annually, until certain deeds should be executed, is, under our statute, like a promissory note under the statute of *Anne*, a debt *per se*, and may be declared on without the averment of any consideration (a).

ERROR to the *Vigo* Circuit Court.

BLACKFORD, J.—Assumpsit by *Arnold* against *Brown*. The declaration contains two counts.

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(a) As a general rule, all negotiable paper is presumed to have been given upon a sufficient consideration; and this rule obtains whether the paper sued on be negotiable under the law merchant, or assignable under the provisions of a statute. *Tibbetts v. Thatcher*, 14 Ind., 86, and cases there cited.



## Arnold v. Brown.

The following is the first count: That whereas, on, &c., at, &c., one *W. Winter*, by his writing obligatory, &c., bound himself in the penalty of \$10,000, with a condition for executing to *Arnold* a deed for a certain tract of land, within three years from the date of the bond, or as soon thereafter as a patent for the land could be obtained; that on, &c., at, &c., *Winter* died; that *Arnold* became entitled to an action on the title-bond; that *Brown*, being one of the heirs of *Winter*, executed with *Markle*, who is since deceased, a note in writing on, &c., at, &c., in consideration that *Arnold* would forbear to sue on the title-bond, until *Winter's* heirs should make a deed for the land, &c.; and by that note agreed to pay to *Arnold* the sum of twenty-four dollars a year from the date, until the deeds for the lands mentioned in the bond should be executed, &c.; that *Arnold* did forbear to sue on the bond, and that the deeds, &c., were not executed to him, for the space of eight years from the date of the note; that thereby *Brown* became liable to pay, &c., the sum of twenty-four dollars a year for the eight years, &c.; and that being so liable, he, in consideration thereof, promised to pay, &c.; yet that *Markle* and *Brown* had not, nor had either of them, paid, &c.

The second count is as follows: That on, &c., at, &c., *E. Brown* and *A. Markle* made their other note in writing, &c., and thereby agreed to pay to *Arnold* or order twenty-four dollars a year from the date, until the deeds for two certain tracts of land, for which *Arnold* held the bonds of *W. Winter*, deceased, should be executed to *Arnold*; that the deeds were not executed, &c., for the space of eight years from the date of the note; that *Markle* was deceased; that thereby *Brown* became liable to pay, &c., twenty-four dollars a year [\*274] for the eight years, &c.; and that being so \*liable, he, in consideration thereof, promised to pay, &c.; yet that *Markle* and *Brown* had not, nor had either of them, paid, &c. Damage \$500.

General demurrer to the first count. To the second count there is a special demurrer, assigning for cause, that no consideration for the promise is alleged. The Circuit Court

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Arnold v. Brown.

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sustained both the demurrers, and gave judgment for the defendant.

We have no doubt in this case. The first count seems to us to be unexceptionable. No objection to it has been pointed out, and we have discovered none.

The second count is also valid. The only cause of demurrer assigned is, that the consideration of the note is not set out. That objection cannot be supported. The law in *England*, in suits on promissory notes within the statute of *Anne*, does not require, nor does the law here in suits on such notes under our statute require, that the consideration of the note should be alleged in the declaration. In these cases, the mere statement of the liability which constitutes the consideration, is sufficient; and it is not material, as to this point, whether the note does or does not contain the words "for value received," or any other words of similar import. The note, whether it contain any such words or not, is, if within the statute, a debt *per se*, and may be declared on without any consideration. The following is the language of a respectable writer on this subject: "With respect to stating the cause or consideration for which the instrument is drawn, as, for value received, &c., that is, in general, unnecessary, in declaring in *assumpsit*, though it may be otherwise in debt. But if it be untruly stated, though it was unnecessary to state it at all, a variance will be fatal: for when stated, it is part of the description of the contract." Lawes on *Assumpsit*, p. 261.

We think the note on which the action before us is brought, is within the statute; and that both counts in the declaration are good. The judgment of the Circuit Court, therefore, sustaining the demurrers to the declaration, must be reversed. See *Crenshaw v. Bullitt*, November term, 1819; *Findley v. Cooley*, November term, 1823.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Whitcomb*, for the plaintiff.

*J. Farrington*, for the defendant

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Martindale, Administrator, v. Moore, Administrator.

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## [\*275] \*MARTINDALE, Administrator, v. MOORE, Administrator.

**STATUTE CONSTRUED.**—The statute of 1822, enacting that no mispleading or lack of pleading should *thereafter* render any executor or administrator personally liable, has no application to a judgment rendered previously to the statute.

ERROR to the *Wayne Circuit Court*.

STEVENS, J.—On the 16th day of *July* 1821, one *Mordecai Mendenhall*, in an action of debt against *Martindale*, the plaintiff in error, and one *William Young*, the administrators of one *Jesse Young*, deceased, recovered a judgment for \$356 debt, and seven dollars and twelve cents damages, together with costs, &c., by default, to be levied of the goods and chattels of the deceased, in the hands of the said administrators, *Martindale* and *Young*, to be administered, if they had so much in their hands, but if they had not, then the damages aforesaid to be levied of the proper goods and chattels of the said administrators. After the rendition of this judgment, *Mendenhall*, the plaintiff, died intestate, and administration of his personal estate was granted to *Moore*, the defendant in error, and on the 5th day of *April*, 1829, said judgment was, by default, revived in the name of *Moore*, the administrator. Afterwards a writ of *fi. fa.* issued on the judgment, and was returned *nulla bona*. *Moore* then declared against the administrators, *Martindale* and *Young*, on said judgment, in an action of debt, averring waste, &c. To this action *Martindale*, the plaintiff in error, appeared and pleaded in bar that neither he nor his co-administrator received any notice of said debt due from the deceased, *Jesse Young*, to said *Mendenhall*, until long after they had fully administered, &c., and that on the 16th day of *June*, 1821, at the time of the rendition of the aforesaid judgment in favour of said *Mendenhall* against him and his co-administrator, they had nothing in their hands to be administered, &c., and that nothing has since come to their hands, &c. To this plea the plaintiff in the court below demurred, and the demurrer was

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sustained, and judgment rendered against *Martindale* for the amount due to the estate of *Mendenhall, &c.*, to be levied of his own proper goods and chattels.

The only question before this Court is whether the [\*276] plea of \**Martindale* is sufficient in law to bar the action of *Moore*, the plaintiff?

The sufficiency or insufficiency of that plea depends entirely upon the construction and effect which the Court may give to the seventh section of an act approved the 22d day of *January*, 1822, entitled, "An act amendatory to an act entitled, 'an act authorizing the granting of letters testamentary and letters of administration,'" &c. The seventh section of that act is in these words, viz: "No mispleading or lack of pleading shall *hereafter* render any executor or administrator liable to pay any debt of the deceased, damages or costs beyond the actual amount of assets which shall or may come into his, her, or their hands." At common law, if an executor or administrator failed to plead that he had fully administered, such failure to plead operated as an admission that he had assets sufficient to satisfy the demand. He was forever afterwards estopped, by this implied admission of assets, from pleading that he had fully administered. By this implied admission of assets, arising from a failure to plead at the proper time the plea of *plene administravit*, executors and administrators might sometimes, possibly, be misled to their injury. To remedy this, the before recited section of the statute of 1822 was enacted. The original judgment on which the proceedings in this case are founded, was rendered against the plaintiff in error about six months before that statute was enacted, and nearly or quite a year before it was in force in the county where the judgment was rendered, and where the parties resided.

The defendant in error insists that if the act of 1822 is so construed as to authorize the defense set up in the plea to the action in the court below, it is unconstitutional and void: 1. Because it will be repugnant to that part of the constitution of the *United States*, and of this State, prohibiting the passage of *ex post facto* laws; 2. Because it will be repugnant to that



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part of those constitutions prohibiting the passage of laws impairing the obligation of contracts; and 3. Because it will have a retrospect beyond the period of its enactment, and will divest or impair the rights of the defendant in error which vested in him previous to the passage of the law, and will be repugnant to a fundamental principle of universal jurisprudence, and of the common law, and will therefore be null and void.

The constitution of the *United States*, and of this [\*277] State, both \*prohibit the passage of *ex post facto* laws, or laws impairing the obligation of contracts.

The first thing then to be determined is, whether this section is an *ex post facto* law? Blackstone defines an *ex post facto* law to be a law made after the commission of an indifferent act, declaring the act to be a crime, and inflicting a punishment upon the person who committed it.

The first case in which the meaning of the phrase *ex post facto*, as used in the constitution of the *United States*, came to be considered, was that of *Calder v. Bull*, 3 Dall., 386. The meaning and extent of the phrase were extensively discussed by several of the judges on that occasion. The case was this: Mrs. *Calder* claimed a certain estate as heiress to one *Morrison*; *Bull* and wife claimed the same estate by devise from the same *Morrison*, and the original question in the Probate Court of *Connecticut* was *devisavit vel non*. On the 21st day of *March*, 1793, the Court set aside the will and refused to record it; by that decree the estate vested in Mrs. *Calder* as heiress, &c. By the laws of *Connecticut*, no new trial could be granted by the Probate Court, or appeal, or writ of error be had, unless applied for within eighteen months after the rendition of the decree, which in that case was not done. In 1795, the legislature by a resolution granted a new trial, with liberty to appeal, &c. A new hearing was had and the will was sustained; and Mrs. *Calder* lost the estate. The case finally came before the Supreme Court of the *United States*, and it was there contended, that the resolution of the legislature granting the new trial, was an *ex post facto* law, in the sense of the constitution of the

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*United States.* The Court, however, held that the words *ex post facto* were technical expressions, and meant laws that made an act done before the passing of the law, and which was innocent when done, criminal; or which aggravated a crime, and made it greater than it was when committed; or which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when it was committed; or which altered the legal rules of evidence, and received less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender; and that the resolution granting the new trial, was not within either the letter or intention of the prohibition.

Afterwards, in the case of *Fletcher v. Peck*, 6 [\*278] Cranch, 87, \*the Court observed that an *ex post facto*

law was one which rendered an act punishable in a manner in which it was not punished when it was committed; and that such a law might inflict penalties on the person, or might inflict pecuniary penalties; and that the legislature was prohibited from passing any law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment. This definition, Chancellor Kent says, is distinguished for its comprehensive brevity and precision. Tucker, in his commentaries, says that Blackstone's definition of an *ex post facto* law has been adopted by the Courts of the *United States*, in their construction of that phrase in the constitution; and that an *ex post facto* law is not considered as extending to matters of contract, or to questions of civil right or private property, but is confined to statutes of a penal character.

Whether these adjudications respecting the meaning of the phrase *ex post facto* were originally correct, we shall not inquire; the point is settled and binding upon us, and we are disposed at all times to stand by things as decided. The statute under consideration not being penal in its character, cannot therefore be *ex post facto*.

The next point is, whether it is a law impairing the obligation of a contract? This prohibition on the legislature of a

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State is of great moment, and affects extensively and deeply its authority. It has given rise to various able discussions, and to protracted litigation. Therefore, a brief review of some of the most important judicial decisions, defining and enforcing this prohibition, may perhaps be proper.

The case of *Fletcher v. Peck*, 6 Cranch, 87, brought this prohibitory clause into direct discussion. The legislature of *Georgia* on the 7th day of *January*, 1795, granted a tract of land to *James Gunn* and others, a company known by the name of the *Georgia* company. Afterwards, on the 13th day of *February*, 1796, about thirteen months after the passage of the act making the grant, the legislature repealed that act, and in the repealing act declared, that the act making the grant was a positive and clear act of usurpation, made without any constitutional authority, and that it was wholly null and void from the beginning, having been obtained by fraud, corruption and undue influence; and that all grants contained in it were null \*and void, and of no binding force or effect, and that they never had any legal existence, and that neither the act, nor any grant or patent under it, should be read as evidence in any court of justice. But the Supreme Court of the *United States* said that a contract was a compact, and is either executory or executed; that an executory contract is one in which a party binds himself to do or not to do a particular thing, and that a contract executed is one in which the object of the contract is performed, and this differs in nothing from a grant; that the contract between *Georgia* and this company was executed by the grant, and that a contract executed, as well as an executory contract, contains obligations binding on the parties; that a grant, in its nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right, and that, in fact, a grant is a contract executed, and that its obligation as such continues in force, and therefore it must be construed to be within the prohibition of the constitution. The Court further unanimously declared that the State of *Georgia* was not only

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restrained by the constitution, but also by general principles, from passing a law divesting the company of their rights.

The case of *The State of New Jersey v. Wilson*, 7 Cranch, 164, is also an important case on this point. It is this: The colonial legislature of that State, in 1758, passed an act authorizing the purchase of land for the *Delaware* Indians, and declared in the act that the lands, when so purchased, should not be subject to taxation. Lands were accordingly purchased and conveyed to trustees for the use of the Indians. The Indians occupied the lands until 1803, when the legislature authorized them to sell them, and they accordingly did sell, and the lands became the individual property of citizens of the *United States*. In 1804, the legislature repealed the act of 1758, and subjected the lands to taxation; but the act of 1758 was held to be a contract, and that the act of 1804, repealing it, impaired the vested rights of the owners of the lands, and was therefore void. In the case of *Terrett v. Taylor*, 9 Cranch, 43, it was held that a legislative grant vested an irrevocable title, and could not be revoked by legislative enactment, it being tantamount to an executed contract. In the case of the *University v. Foy*, 2 Hayw., 310, the Supreme Court of *North Carolina* pronounced a statute void which repealed a

[\*280] grant to the university, although \*the university, in the first instance, received the grant from the State as a gift, by an act of the legislature. In the case of *Pawlet v. Clark*, 9 Cranch, 292, the same principle is established, and the principle carried, perhaps, something further. The Court declares that no legislative act can divest even a town corporation of a vested right to property; that such an act is not only unconstitutional, but is contrary to the solid principles of just legislation.

But in the great case of *Dartmouth College v. Woodward*, 4 Wheat., 518, this subject was most elaborately discussed both by the counsel and by the Court. The substance of that case is this: Dr. *Wheelock* founded a charity on funds owned and procured by himself, and he was the sole dispenser, legal administrator, and owner of the funds; he made his will,



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devising this property in trust to continue the existence and uses of a certain school. He then applied to the King of *England* for a charter for the persons by name, whom he had, by his will, appointed to be the future trustees of his charity. In 1769, the King, by his letters patent, created and established a corporation. The preamble to the charter cites that it is granted at the request of Dr. *Wheelock*, and that he is the founder. The letters patent then proceed to appoint the twelve persons named by the Doctor the trustees, by the name of the "Trustees of Dartmouth College," who should have perpetual existence as such corporation, with power to hold and dispose of the lands and funds for the use of the college, together with the ordinary powers of a corporation. They were to employ and pay a president, tutors, ministers, and other officers of the college, at discretion. There were to be forever twelve trustees, and no more, with the right of filling all vacancies in their own body. To the trustees were given the superintendence and visitation, together with power to appoint and remove all officers at their discretion, and to fix the amount of salaries. This corporation was created and went into effect before the revolution, and after it had exercised its corporate powers and rights for about fifty years, the legislature of *New Hampshire* (the State in which it is situated), declared, by a legislative act, that the public good and the interests of the institution required that the charter should be amended, and accordingly passed an act against the will of the corporation, amending the charter, by which amendatory act nine new trustees

[\*281] were created and added to the \*board, making in all twenty-three trustees instead of twelve. A new board of twenty-five persons was also created, who were to oversee the institution, &c. This amendatory act was declared by the Court null and void. The Court stated that the constitution embraced every species of contract respecting property and objects of value, and which confer rights that may be asserted in a court of justice, and that the charter granted by the King was a contract. Judge *Story* said that the constitution extended to all manner of contracts and grants, whether beneficial or not

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to the person in whom the rights and privileges secured by them vested.

Again, in the case of *Green v. Biddle*, 8 Wheat., 1, it was observed by the Court, that the objection to a law on the ground of its impairing the obligation of contracts, could not depend upon the extent of the change effected by it; any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with conditions that are expressed, however minute or apparently immaterial in their effect upon the contract, or upon any part or parcel of it, impairs its obligation; and that upon this principle it is, that if a creditor agrees with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change may be for his benefit. In that case, it was decided that a compact between two States was a contract within the meaning of the constitution.

There have been various other decisions in the *United States*, on the insolvent and bankrupt laws of the several States, still further defining what is a contract within the meaning of the constitution, and what is a law impairing the obligation of a contract within that prohibition. Most of these decisions were reviewed by this Court at the *November* term, 1831, in the case of *Pugh v. Bussel*, and need not at this time be further adverted to.

This branch of the case has been thus particularly examined, for the purpose of ascertaining whether the judicial decisions would, under any view of the case, bring the statute now under consideration in conflict with that part of the constitution prohibiting the passage of laws impairing the obligation of contracts; but no decision has been found that appears [\*282] clearly to \*authorize such a construction, and to say the least of it, it is certainly doubtful.

The next inquiry is, whether, if this 7th section is so construed as to authorize the defense set up in the plea to the action in the Court below, it will have a retrospect beyond the

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time of its enactment, and thereby impair rights which vested in the defendant in error before the passage of the act?

A vested right is defined to be the right the person has, in whom it vests, to do certain acts, or to possess, occupy, own, or enjoy certain things, or to ask, demand, recover and receive certain things, according to the law of the land at the time; and a law is deemed retrospective which takes away, or impairs in any manner, such vested right.

The position assumed by the plaintiff in error is, that the statute under consideration only changes a rule of evidence in relation to certain suits, which might be brought against executors or administrators to make them personally liable for wasting the assets; and that it relates only to such suits as should be brought after the passage of the act, and is therefore prospective in its effect only, and is not retrospective; that by the law as it stood at the time of the rendition of the original judgment against him, the judgment was of itself sufficient evidence to establish the fact that he had a sufficiency of assets, and that in this suit against him, to make him personally liable for having wasted the assets, the plaintiff would not, by the law as it then stood, have needed any evidence, other than the judgment itself, to prove the waste; and that the only change effected by the statute is the repeal of that rule of evidence; that since the passage of that act, the judgment is not evidence of the waste of the assets, but that the plaintiff is now required to prove the waste *aliunde*.

Although this position, to say the least of it, is very plausible, and at the first blush strikes the mind with some force, yet it is apprehended that it is not tenable. The premises from which the conclusion is drawn are not correct, and hence the conclusion can not be. It is assumed as a fact, that although by the law as it stood before the passage of this act, the judgment by default would have of itself been sufficient evidence to prove that the administrator had wasted the assets, yet that he would have had a right to make an issue, to be tried, of waste or no waste. But such is not the fact: the [\*283] administrator by failing to \*plead the plea of *plene*

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*administravit* to the original suit, impliedly confessed that he had assets sufficient to pay the demand; and as the law then stood, he was bound the instant that judgment was rendered, to pay the amount, whether he had assets of the intestate or not. He was, by that failure to plead, estopped as to that demand, and his liability to pay it irrevocably fixed. Every person is bound to know the law, and so was this administrator: he was bound to know that if he failed to plead that he had no assets, it was in law a confession that he had assets; and that it was an irrevocable presumption in law, if he did not so plead, that he intended it as a confession that he had assets, and would be held liable accordingly. Such was the law at that time, and the administrator was bound to know it. The judgment, then, which was rendered against him, was not merely evidence that he had assets, but it forever estopped the administrator from pleading that he had none. All litigation as to assets was at once at an end, and the plaintiff's right to recover against the administrator, on a suggestion of waste, was complete and irrevocable. The defendant was not permitted to make an issue of waste or no waste, as he appears to suppose he was.

If, then, the statute of 1822 has so impaired the force and effect of that judgment, as to open the door of litigation which was forever closed, and permit the administrator now to come in and say that he has no assets, and that he is not therefore liable to pay that judgment, it must be retrospective in its effect, and it does impair clear, valuable, and distinct rights, which, by the law of the land, vested in the defendant in error long before that statute was enacted.

By way of illustration we will make a case. By the law as it now is, a failure on the part of an executor or administrator to plead that he has fully administered, is not a confession that he has assets, nor does it estop him from afterwards pleading that he has none. Now suppose the legislature should repeal the present statute and revive the old law, would that make executors and administrators who had failed to plead that they had fully administered, and had let judgments go against them



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by default under the law as it now is, liable to pay those judgments whether they had assets or not? Would they be estopped from making that defense which the laws of the land authorized them to make when the judgments were [\*284] rendered? No, \*certainly not. All, it is presumable, would with one voice say that such a construction would be unjust, that such a law would be retrospective, and that it would impair vested rights. And just so it is in the case now under consideration: the cases are precisely parallel: the creditor's rights are as sacred as the rights of the debtor.

The next and last point is, whether a law that has a retrospect beyond the time of its passage, so as to impair vested rights, is so repugnant to any fundamental principle of universal jurisprudence, as to be null and void?

Blackstone says that all laws should be made to commence *in futuro*, and not have a retrospective effect. Judge *Marshall* says that the better opinion is, that the nature of society and government is such, that even without a written constitution to that effect, the law-making power is by general principles confined within certain limits; and in *Bacon's Abridgment* it is said to be in the general true, that no statute is to have a retrospective operation beyond the time of its commencement.

In the case of *The Society, &c., v. Wheeler*, 2 Gall., 105, it was decided that the act of *New Hampshire* allowing to occupying tenants the value of their improvements, on recoveries against them, was retrospective and void as to all improvements made before the law was passed, although the act was in general terms. In the case of *Gilmore v. Shuter*, 2 Show., 16, the same principle was decided. That was this: The statute of frauds enacted that from and after the 24th day of *June*, &c., no action shall be brought whereby to charge any person upon an agreement made upon consideration of marriage, unless such agreement or some memorandum or note thereof be in writing. The suit was not brought until after the act was in force, which says "no action shall be brought," and it was upon a contract not in writing, but it was made before the act took effect. The Court held, that the act could not have a

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retrospect to take away an action upon a contract that was good in law when it was made. The case of *Couch, qui tam v. Jeffries*, 4 Burr., 2460, is also in point. A penalty was given by statute to any person who would sue for the same, against all persons who failed to pay the stamp duty upon an indenture of apprenticeship. *Jeffries* violated the statute, and *Couch* brought suit for the penalty. The legislature, after the suit was brought, passed a general act giving relief [\*285] generally to such delinquents: but the Court said \*it came too late to give relief in that case; that the law, as it stood when the suit was brought, authorized any person who pleased to commence it, and that as soon as the plaintiff had commenced the action, he had a vested interest in the penalty, and that the legislature, by a subsequent act, could not take it away; nor could the Court suppose that the legislature intended to take it away. In the case of *Culder v. Bull*, before noticed, the Court said that every *ex post facto* law is retrospective, but that every retrospective law is not *ex post facto*, but must generally be unjust; and that every law that takes away or impairs rights which exist by the law then in force, is retrospective, and is generally oppressive.

In the cases of *Kelly v. Harrison*, 2 Johns. Cas., 29; *Jackson v. Lunn*, 3 Johns. Cas., 109; and *Calvin's Case*, 7 Co., 1, it has been asserted, as a principle of the common law, that a revolution, or a division of an empire, or a change of empire, creates no forfeiture of previously vested rights of property, not even of a foreign corporation; and that this principle is equally consonant with the common sense of men, and with the maxims of eternal justice. In the case of *Lewis v. Brackenridge*, 1 Blackf. Rep., 220, this point, as well as the one respecting the constitutional prohibition as to the passing of laws impairing the obligation of contracts, are both discussed by the Court, and it is, in that case, settled that a statute can not have a retrospective operation, so as to divest a vested right of action. In the case of *Dash v. Van Kleeck*, 7 Johns. Rep., 477, the Court says that it is a principle of universal jurisprudence that

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laws, either civil or criminal, must be prospective, and can not have a retrospective effect.

According to Bracton, it is a principle of the common law as old as the law itself, that a statute of even the omnipotent parliament of *England* is not to have a retrospective effect; and it is also a principle of the civil law that the lawgiver can not alter his mind to the prejudice of a vested right. Judge *Tucker* says that though *ex post facto* laws, and those which impair the obligation of contracts, are alone prohibited by the constitution, yet the general sentiment of every enlightened jurist is opposed to laws of every description which are retrospective in their effects; that it is inconsistent with the very notion of law that it should be retrospective, and that it is justly and wisely said that retrospective laws are inconsistent with sound [\*286] legislation \*and the fundamental principles of the social compact; that the power of the State is circumscribed by general principles, as well as by the constitution, and that all retrospective laws should be pronounced void.

It is freely admitted that the importance and difficulty of the questions presented by this record are deeply felt. The question of the extent of legislative power, and the question whether a law is void for its repugnance to the constitution, or to any fundamental principle, is at all times a question of much delicacy, and should always be approached with due caution, and should never be decided affirmatively in a doubtful case. The repugnancy and incompatibility should be clear, and the conviction strong and conclusive, before a legislative act should be declared null and void. But notwithstanding that, when such a point is directly made, and the Court is impelled by its duty to decide, it would be unworthy of further confidence if it could be so unmindful of the obligation imposed on it as to even hesitate to discharge its duty. No fear of responsibility or dread of consequences should ever have an abiding place in the council chamber of a judicial tribunal.

In the case now before us, it is the unanimous opinion of the Court that the rights of the defendant in error are not and can

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not be impaired by the act of 1822, or by any of the subsequent acts, and that the demurrer to the plea was correctly sustained.

Judge *Tucker* says that statutes are *prima facie* prospective in their operation, and it never should be presumed that the legislature intended them to be retrospective, unless they are made so by express words. The same is also said in the case of *Elliott's ex'r v. Lyell*, 3 Call, 268.

In the statute now under consideration, there is nothing to authorize the presumption that the legislature intended it to have a retrospective effect. The words of the statute are, "No mispleading or lack of pleading shall *hereafter* render any executor or administrator liable," &c. These words, both by their sense and their plain grammatical construction, authorize the Court to say that the legislature intended the word *hereafter* to apply exclusively to such mispleading and lack of pleading as might take place after the passage of the act, and not to such as had taken place before, and indeed that is the construction which at first naturally presents itself to every mind. It is, however, admitted that it will also bear the construction given \*to it by the plaintiff in error, but that the authorities do not authorize it, and the Court feels bound to say that the legislature did not intend that provision to extend to those cases of mispleading and lack of pleading which had then taken place at the time of the passage of the act (1).

Before this case is dismissed, it is perhaps proper to notice a few cases, which may be supposed to conflict in some particulars with this decision.

In the case of *Calder v. Bull*, the resolution of the legislature of *Connecticut* granting a new trial, would be clearly retrospective, had it been a legislative act, but the Court declared it to be a judicial act. It took place under the *British* charter, before that State had made for itself a written constitution; and under that charter the legislature had been, from the commencement of the colony, so far a part of the judiciary as to have the power to grant new trials, and had been in the continued exercise of that power; hence the Court



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declared the resolution to be a judicial act. In the case of *Fullerton et al. v. The Bank*, 1 Pet. Rep., 604, the statute in question would have been retrospective and void, if it had affected the rights of the parties; but the Court said that it only affected the remedy and not the rights of the parties. There is an obvious distinction between the statutes which operate upon the remedy only, and those which operate upon the rights of the parties. The remedies afforded by law for the enforcement of rights, are purely the creatures of legislative power, and subject at all times to alteration, at the pleasure of the legislature; and such statutes may be made retrospective in their operation in many instances, if it be so expressly declared. 1 Tucker's Comm., 3; *Gaskins v. The Commonwealth*, 1 Call, 194; *The Commonwealth v. Hewitt*, 2 Hen. & Munf., 186, *et seq*; *Day v. Pickett*, 4 Munf., 104.

The case of *Satterlee v. Matthewson*, 2 Pet. Rep., 380, is the authority on which the plaintiff in error with great apparent confidence relied, to establish the principle that the legislature has the power to pass retrospective acts, which may impair vested rights, provided the obligation of a contract is not impaired. The great importance of the question requires a review of that case somewhat in detail; and the parts of history and the principal facts necessary to a proper understanding of it are these:

In the month of *November*, 1768, a number of men  
 '288] and \*families emigrated from the State of *Connecticut* into the northern part of *Pennsylvania*, and took possession of a tract of country about *Wyoming*, under a *Connecticut* title, alleging that the charter of *Connecticut* covered the soil in question, and that that charter being older than the charter of *Pennsylvania*, they were legally entitled to the land in question. *Pennsylvania*, also, claimed the same country, and had granted it, under her land system, to her citizens. A difficulty instantly ensued between those adverse claimants, which is known by the name of the *Wyoming* controversy. This warfare between those claimants was carried on for years, by a disorderly and illegal contest of individual

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force, and was attended with riots, bloodshed, and the loss of many lives. Finally the congress of the *United States*, under the confederation, appointed a court of judges or commissioners to decide upon the claims of the respective States of *Connecticut* and *Pennsylvania*. These judges, on the 30th day of *December*, 1782, made at *Trenton* their final decision, now known by the name of the decree of *Trenton*, establishing the right of jurisdiction and government of the disputed territory to be in *Pennsylvania*; but left the particular titles of individuals, claiming the right of soil, to be decided in some other way. In 1795, in the case of *Van Horne v. Dorrance*, 2 Dall. Rep., 304, the right of title to the soil was for the first time settled to be in *Pennsylvania* also. So soon as that question was settled, the legislature of *Pennsylvania* commenced passing acts to exterminate and put a final end to those *Connecticut* titles; and in that year (1795); and the year 1802, passed the two acts which produced the difficulty in deciding the case between *Satterlee* and *Matthewson*. These were the acts called the intrusion act, and the act suspending the statute of limitations as to those titles. These acts make it a penal offense, punishable with fines and imprisonment, and also labor as a convict, for any person to settle, enter, or intrude on those lands by color of a *Connecticut* title, or to sell, possess, or convey any of those titles, &c. Under these acts, the courts of justice of *Pennsylvania* decided, that no legal demand, claim, or right, could arise or exist by virtue of those titles, or by virtue of any contract respecting them, or bottomed on them. They decided that the vendor could not recover from the vendee the purchase-money, because the contract was in violation of those statutes, and the plaintiff had no

[\*289] right in a Court of justice. \*They also decided, that the relation of landlord and tenant did not, and could not exist, between a landlord who held by those titles and his tenant, because the title, entry, possession, and the contract making the lease, were all in violation of those statutes, and the landlord had no right in a court of justice. These acts, however, on which these decisions are founded, expressly

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excepted from their operation and effect, all entries, settlements, and contracts, made prior to the passage of the acts; and the acts themselves only continued in force until *January*, 1814, when they were repealed. 6 Smith, 122. These are substantially all the remote facts which have any bearing on the case. The immediate facts which constitute the gist of the action itself are these:

In 1784 or 1785, *Matthewson* settled on the land in controversy, under a *Connecticut* title, and, in 1790, leased a portion of it to *Satterlee*. *Satterlee* occupied the land under the lease until in 1812, when he purchased in an outstanding adverse title, which, he said, covered the land he occupied as tenant to *Matthewson*; after which he claimed the land as his own. *Matthewson*, in 1816 or 1817, instituted an action of ejectment against *Satterlee* in the Court of Common Pleas of *Bradford* county, and upon the trial *Satterlee* attempted to set up this outstanding adverse title which he had purchased, but the Court charged the jury, that the tenant could not set up an adverse title against his landlord during his life; that if he wished to dispute his landlord's title, he must first surrender his possession under his lease, and then institute his suit upon his own title, which he had purchased. The jury found for *Matthewson*, and *Satterlee* removed the case to the Supreme Court of *Pennsylvania*, and that Court, in 1825, reversed the judgment of the Court of Common Pleas, awarded a *venire de novo*, and remanded the cause back to the Common Pleas of *Bradford* county for a new trial; because, that Court said, the relation of landlord and tenant could not exist between persons holding under a *Connecticut* title. Immediately after this decision, on the 8th of *April*, 1826, the legislature passed an act, by which it was enacted, "That the relation of landlord and tenant should exist and be held as fully and effectually between *Connecticut* settlers and *Pennsylvania* claimants, as between other citizens of the commonwealth."

On the 10th of *May*, 1826, after the passage of this [\*290] act, the \*ejectment again came on to be tried in the Court of Common Pleas of *Bradford* county, and the

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judge, after stating the above recited act, charged the jury that "it is a general principle of law, founded on wise policy, that the tenant shall not controvert the title of his landlord, and prevent the recovery of his possession, by showing that the title of the landlord is defective; that the Supreme Court had in that case decided, that when the landlord claimed under a *Connecticut* title, the relation of landlord and tenant could not exist, but that the legislature had thought otherwise, and he should be bound by their decision. *Matthewson* again recovered, and *Satterlee* again carried the case to the Supreme Court of *Pennsylvania*, but that Court affirmed the judgment of the Court of Common Pleas. *Satterlee* then carried the case to the Supreme Court of the *United States*, and assigned as a principal error, the following, viz: That the act of the 8th of *April*, 1826, is repugnant to the constitution of the *United States*: and this was the only error assigned, which gave that Court jurisdiction of the case.

The decision of the Court was in substance this: This is a controversy between citizens of the same state, respecting an act of the legislature and a decision of the Supreme Court of the same state, and the Supreme Court of the *United States* has no power to interfere with it, or to reverse the decision of the State court, unless the statute in question is repugnant to the constitution of the *United States*. It may be true that this statute is unwise and unjust, and it may be true that it is an exercise of a judicial function by the legislature, and it may also be true that it is retrospective in its operation, but this Court has no power to inquire into that. The only question for us to decide is, whether it is repugnant to the constitution of the *United States*? If it is neither an *ex post facto* law, nor a law impairing the obligation of contracts, our power is at an end; and it is not an *ex post facto* law because it is not penal, nor does it impair the obligation of any contract known to the record, and, therefore, is not repugnant to the constitution of the *United States*.

There is, certainly, nothing in this decision to sustain any position assumed by the plaintiff in error in this case.



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We will now return to the opinion of the Supreme Court of *Pennsylvania*. That Court, in 1825, decided that the relation of landlord and tenant did not exist between *Satterlee* [\*291] and \**Matthewson*, because *Matthewson* claimed under a *Connecticut* title. Now it is clear, that that decision was erroneous. There was no such law in *Pennsylvania* at that time; the statutes out of which that rule of decision grew, having been repealed in 1813 and 1814, before that suit was commenced; and as to the settlement and claim of *Matthewson*, and the lease between him and *Satterlee*, there never had been any such law or rule of decision. Those acts upon which that rule of decision was founded, were passed ten or eleven years after *Matthewson* had made his settlement, and about five years after the lease was made to *Satterlee*, and *Satterlee* was in possession under it. Upon general principles, then, these statutes were, as to *Matthewson* and *Satterlee*, retrospective and void. They were, also, in conflict with the constitution of the *United States*, being penal statutes; they were, as to *Matthewson* and *Satterlee*, *ex post facto* laws and void. The Legislature, however, did not leave their operation to be regulated by the controlling power of the constitution and general principles, but expressly declared upon the face of the intrusion act, that they should not affect those who had made settlements before the passage of the first act in 1795. These statutes were not even intended by the legislature, to be retrospective in their operation; and to prevent any such construction, it was stamped upon their face that they were to be applied only to those who might settle, enter, or intrude, after the date of the passage of the first act in 1795.

The act of the 8th *April*, 1826, was not then a retrospective act, as has been supposed, but was simply a declarative act declaring what the law was, and not an act creating and making new law.

Mr. Price and Mr. Peters, in the argument of that case before the Supreme Court of the *United States*, both say, that the decision of the Supreme Court of *Pennsylvania* of 1825, must have been an oversight; that it is evident from the report

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of the case, that the impression upon the minds of the judges was, that the intrusion act was in full force, and that it applied to the case before them; that it no where appears in the opinion of the Court, or in the arguments of counsel, that those acts were repealed, or that they did not extend to the case before them; and they both further say, that the opinion of the Court was based upon the case of *Mitchell v. Smith*, 1 Binn. [\*292] Rep., 110, \*a decision which was made under those statutes while they were in force, in a case to which they applied, without ever recurring to the fact of the repeal of the statutes, or the fact that they did not, when in force, extend to the case of *Matthewson and Satterlee*. But this is not all; the Supreme Court itself has shown that it committed an error, not indeed in so many words, but by its after decisions. At the very next term after the decision was made in 1825, in *Matthewson and Satterlee's* case, the case of *Overton v. Tracy*, 14 Serg. & Rawle, 311, came on to be tried, and they then decided that the disabilities of settlers under *Connecticut* titles were at an end, and that contracts respecting them, and founded upon them, were good and valid in law. This shows almost conclusively, that the Court thought that a mistake was made in the first decision, and that the law was not as it had by that decision been declared to be. And in the last decision of that Court, of this case of *Matthewson and Satterlee*, when the decision of 1825 in the same case is directly reversed, the Court does not base its decision upon the act of the Legislature of the 8th of *April*, 1826. The decision of the Court of Common Pleas is simply affirmed on all the five points of error assigned, without any reference to the statute. It is, then, fairly to be presumed, that that Court viewed that statute simply as a declaratory act, and not as an act creating or attempting to create, new and retrospective law. If it had not been so viewed, something would certainly have been said about it.

This great case, then, in all its important points, appears to be rather adverse to the position taken by the plaintiff in error in this case; at least, there is nothing in it that sustains him.

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Muir v. Craig.

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*Per Curiam*.—The judgment is affirmed with costs.

*J. Rariden*, for the plaintiff.

*O. H. Smith*, for the defendant.

(1) That the statute of 1822, referred to in the text, does not apply to judgments against executors or administrators, rendered before its passage, was decided by this Court in 1830, in the same case between these parties. *Moore, adm'r, v. Martindale, adm'r*; vol. 2, of these Rep., 353. And, again, in 1831, on a petition for a rehearing of the cause, the Court gave the same opinion, and overruled the petition. See a similar statute to that of 1822, in Rev. Code, 1831, p. 169

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[\*293]

## \*MUIR v. CRAIG.

JUDICIAL SALE—RECOVERY BACK OF PURCHASE MONEY.—The purchaser at sheriff's sale of land, to which the execution-debtor had no title, but which belonged at the time to the *United States*, can recover from the debtor, in equity, the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor (a).

ERROR to the *Ripley Circuit Court*.

BLACKFORD, J.—This was a bill in chancery filed by *Muir* against *Craig*. The bill charges, that one *Jennings* had obtained judgment against *Craig* for \$379.92; that execution was taken out on that judgment; that the sheriff levied the execution on a certain tract of land supposed to be the property of *Craig*; that the complainant, believing the land to be *Craig's*, purchased the same at the sheriff's sale for \$295, paid the purchase-money, and received the sheriff's deed. The bill further charges that *Craig*, both on and before the day of sale, represented the land to be his; that the land in reality belonged to the *United States*, and not to *Craig*; and that the sheriff's sale and deed conveyed no title to the complainant. The object of the bill is to compel the defendant, who is the

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(a) *Hawkins v. Miller*, 26 Ind., 173; *Seller v. Lingerman*, 24 Id., 264; *Richmond v. Marston*, 15 Id., 134; *Pennington v. Clifton*, 10 Id., 172; *Preston v. Harrison*, 9 Id., 1.

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judgment-debtor, to refund to the complainant the amount of the purchase-money for the land, paid by the latter to the sheriff.

The answer denies all the particulars of fraud charged, but it admits the other material facts stated in the bill. There was a supplemental bill filed, but the cause does not require a particular notice of it. There are a number of depositions in the record, but they leave the case in the same situation, substantially, in which it previously stood upon the bill and answer.

The Circuit Court dismissed the bill at the complainant's costs.

The question which is presented by this case is, whether the purchaser at sheriff's sale of land, to which the execution-debtor had no title, but which belonged at the time to the *United States*, can recover from the debtor, in equity, the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor?

We find this question, so far as it could arise in a case [\*294] of the \*sale of a negro, decided in the affirmative by the Court of Appeals in *Kentucky*, in *M'Ghee v. Ellis*, 4 Litt., 244. Our opinion is in accordance with that decision, the principle of which must, we conceive, be applicable to a case of the sale of land. *Craig's* debt to *Jennings*, as to \$295, has been paid by *Muir*. The consideration for that payment, viz: the land sold by the sheriff to *Muir* as *Craig's* property, has entirely failed. *Muir* must be entitled, under the circumstances of the case, to recover in equity from *Craig*, who has received the benefit, the purchase-money paid to the sheriff for the land, with interest. The decree of the Circuit Court, in favour of the defendant, is erroneous and must be reversed.

*Per Curiam*.—The decree is reversed with costs. Cause remanded, &c.

*J. Test* and *A. Lane*, for the plaintiff.

*G. H. Dunn*, for the defendant.



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The State v. Dole.

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## THE STATE v. DOLE.

**INDICTMENT—GAMING.**—In an indictment for permitting gaming in a licensed grocery, it is not necessary to set forth the name of the game that was played.

ERROR to the *Vermillion* Circuit Court.

M'KINNEY, J.—Indictment for suffering gaming in a licensed grocery. The indictment was quashed by the Circuit Court, because the particular game suffered and permitted to be played in the grocery, was not stated.

The penalties imposed, by the 65th section of the act relative to crimes and punishments, upon a tavern-keeper, or retailer of spirituous liquors, &c.. are incurred by suffering a game to be played by which money, or any article of value, is lost or won, and not by suffering a particular game to be played, since all games for such purposes appear to be equally prohibited. In the cases of *The Commonwealth v. Lampton*, 4 Bibb, 261; *English v. The Commonwealth*, Litt. Sel. Cas., 417; and *Montee v. The Commonwealth*, 3 J. J. Marshall, 133, it has

been decided, upon a statute with similar provisions, [\*295] that the \*offense is consummated by suffering a game to be played, and that it is therefore not necessary to state the names of the persons engaged in the games. We think that if the names of the persons playing be not necessary to be stated, it is unnecessary to state the particular game. We are therefore of opinion that the indictment is sufficient, and that the Court erred in quashing it.

*Per Curiam.*—The judgment is reversed, with costs. Cause remanded, &c.

W. Herod, for the State.

J. Whitcomb, for the defendant.

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 Martin v. Densford.
 

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### MARTIN v. DENSFORD.

**JURISDICTION.**—Courts of law and equity have concurrent jurisdiction, as to suits against heirs, executors, or administrators, for the debts of the decedent (a).

**COMMISSIONERS' SALE—REPORT.**—Commissioners for the sale of real estate should report within a reasonable time, and the report should show the sum the estate sold for, the time when it was sold, and the decree requiring it, that the rents and profits for seven years had been first offered for sale.

#### ERROR to the *Clark* Circuit Court.

**STEVENS, J.**—On the 20th day of *June*, 1826, *Densford* filed his bill in chancery against *Robert Martin*, alleging that on the 10th day of *December*, 1823, one *William Martin*, deceased, by his promissory note of that date, promised to pay to him, on demand, eighty-three dollars and thirty-one cents, and that the deceased was also indebted to him in the further sum of thirty dollars for goods, wares and merchandise, and exhibits a bill of particulars of the goods, wares and merchandise, and also exhibits the promissory note, and makes them a part of his bill. He further shows that the deceased paid on the note forty-nine dollars before his death. He then alleges that in the month of *June* the deceased departed this life intestate, leaving the balance aforesaid on the note unpaid, and also leaving the thirty dollars for the goods, wares and merchandise unpaid, and that they still remained unpaid. He further alleges that the deceased left no personal estate, but that he [\*296] was the owner and possessor, at the time of \*his death, of the undivided half of in-lot of land number seven, in the town of *Utica*, &c., on which there were lasting and valuable improvements, &c., such as a large and commodious dwelling house, the rents and profits of which, at “a moderate estimate,” were worth fifty dollars *per annum*; that the deceased held the premises by a legal title in fee simple, which appeared of record, &c. He further alleges that he left no heirs or legal representative surviving him known to the complainant, except

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(a) *Bryer et al. v Chase*, 8 Blackf., 508.

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one brother, *Robert Martin*, who resides somewhere in *Missouri* or *Mississippi*, and that administration has never been had upon the estate of the deceased. He makes the said brother a defendant to his bill, and calls upon him to answer, &c. He then prays that the said lot of land and premises, &c., may be made subject to his claim; that in the meantime a receiver be appointed to receive the rents and profits, and that they may also be made subject to his claim, &c.; that the said lot and premises be decreed to be sold, &c.

Such proceedings were then had that on the 26th day of *October*, 1826, the bill was taken as confessed against the defendant for want of an answer, and a final decree rendered, &c. The decree is that the complainant recover his debt, &c., that is, the balance due on the note, with interest, and the thirty dollars for the goods, wares and merchandise, making the sum of seventy-six dollars and ten cents, together with interest thereon until paid, and also his costs, &c.; that the lot and premises were subject to the debt, &c., and that they should be sold, &c. *Thomas Carr* was appointed a commissioner to sell and convey, &c., first offering for sale the rents and profits for seven years, and if they would not sell for a sufficiency to satisfy the complainant his debt, interest and costs, &c., then to sell the fee simple, &c., and out of the proceeds of such sale to pay off the debt, interest and costs, and return the overplus, if any, to the defendant, &c. Afterwards, in *June*, 1828, the commissioner made a return to the Circuit Court that he had sold the lot and premises to the complainant, &c. The sale and proceedings of the commissioner were affirmed by the Court, and a deed of conveyance was then and there, in Court, made and acknowledged by the commissioner to the complainant, &c.

The plaintiff in error contends that this record, proceeding and decree of the Circuit Court are erroneous, and ought to be reversed and set aside.

[\*297] \*The first error assigned is, that the complainant's bill exhibits no foundation for a suit in equity; that his claim is exclusively legal; and that the legislature had

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furnished him an ample legal remedy, at common law, by their act authorizing writs of foreign attachment to issue against non-resident heirs or devisees. It is true, that it is a well-settled general principle, that a party can not apply to a court of equity, if he have a full and complete remedy at common law. To this general and salutary principle, there are, however, a few exceptions, one of which is, where the debtor is dead, and the creditor has to proceed against his heirs, executors, or administrators; in such cases courts of equity have concurrent jurisdiction with courts of law; and the creditor may elect into which court he will go. This has been long since a settled and necessary right. *Martin v. Martin*, 1 Ves., sen., 211; *Yates v. Hambly*, 2 Atk., 360; *Jesus College v. Bloome*, 3 Atk., 262; *Thompson v. Brown*, 4 Johns. Ch. Rep., 619.

The next error assigned is, that the whole proceedings are *sui generis*, without precedent, and wholly defective and void. This assignment, though very general in its terms, is strictly true. The bill shows that the intestate departed this life in the month of *June*, 1826, and that on the 20th day of the same month the suit was commenced; and in one hundred and twenty-eight days thereafter a final decree for the sale of the premises was rendered. The complainant's demand, including interest up to the time of rendering the decree, amounted to only seventy-six dollars and ten cents; and the bill shows that the rents and profits of the premises which were sold, were, at a "moderate estimate," worth fifty dollars *per annum*. If this was true, it is evident that the rents and profits of the premises would have paid the debt, interest, and costs, in two years; yet, in about one hundred and twenty-eight days from the death of the intestate, the fee simple was ordered to be sold. The final decree was made on the 26th day of *October*, 1826; and the commissioner who was appointed to sell and convey, never makes any report until in *June*, 1828. Nearly two years elapsed before he reported his proceedings; and when they are made, what are they? He says that he sold the premises to the complainant, but for how much is not stated.



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Swann v. Rary.

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Nor does he inform the Court when he made the sale, or how he made it; whether he offered the rents and profits for sale for seven years or not, is not stated. Yet the Court [\*298] confirms the sale, \*and a deed of conveyance is made to the complainant. Such a record and proceedings carry on their face their own condemnation. The whole taken together exhibit an abuse of the powers of the Court, we hope never to see again.

*Per Curiam*.—The decree is reversed with costs. Cause remanded, &c.

*J. H. Farnham*, for the plaintiff.

*H. P. Thornton*, for the defendant.

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SWANN v. RARY.

**SLANDER—PLEADING.**—To an action of slander for charging the plaintiff with stealing hogs, it is not a good plea in bar, that the plaintiff had stolen one hog.

**SAME—EVIDENCE.**—The defendant can not prove, in such an action, that it was generally known in the neighborhood, that there had been a quarrel between the parties.

**SWEARING JURY.**—The practice of swearing a jury as well to try the issue in fact, as to inquire of the damages on an issue in law previously found for the plaintiff, obtains only in cases where the decision of the issue in law entitles the plaintiff to damages, without regard to the trial of the issue in fact.

**ERROR** to the *Parke* Circuit Court.

**BLACKFORD, J.**—*Rary* brought an action of slander against *Swann*. The declaration contains several counts. The words charged to have been spoken by the defendant are,—first, that the plaintiff is a hog thief; secondly, that the plaintiff has stolen hogs. The defendant pleaded, first, not guilty; secondly, the statute of limitations; thirdly, that the plaintiff had stolen one hog; fourthly, that the plaintiff had stolen three hogs. On the plea of not guilty issue was joined. To

the plea of the statute of limitations, the plaintiff replied that the suit had been commenced within the time, &c. To the third plea, that the plaintiff had stolen one hog, the plaintiff demurred, and assigned as cause of demurrer, that the plea does not answer the whole declaration, which charges the defendant with saying that the plaintiff had stolen hogs in the plural number. To the replication to the second plea, there is a rejoinder and issue. To the fourth plea, the plaintiff replied *de injuria*, &c. The Circuit Court sustained [\*299] the demurrer to the third plea. The \*jury, impaneled to try the issues in fact, found a verdict for the plaintiff, and assessed the damages at \$550. The defendant moved for a new trial, but his motion was overruled, and a judgment was rendered against him on the verdict.

The first ground relied on by *Swann*, the plaintiff in error, for a reversal of the judgment, is, that his third plea was valid, and that the demurrer to it should have been overruled. The cause of action is—that the defendant had said that the plaintiff had stolen *hogs*. The plea professing to answer the whole declaration, is—that the plaintiff had stolen *one hog*. This plea, it appears to us, is not a good bar to the action. The fact that the plaintiff had stolen one hog, would not justify the defendant in charging him with stealing two or more hogs. There is a case, referred to by the plaintiff's counsel, very similar to the one under consideration. In that case, the words laid in the declaration are—"The plaintiff (a commissioner) has returned, as the depositions of *witnesses*, into the exchequer, the examination of *divers* who were never sworn." The plea in bar was: "That the plaintiff (a commissioner) returned into the exchequer the examination of one *J. S.* who was never sworn, and therefore," &c. On demurrer this plea was adjudged bad. The Court said, that though *one* who was not examined was returned into the exchequer, yet that does not prove the words, "That the plaintiff returned, &c., *divers*," &c., because the justification is of *one witness only* returned, and the words are in the *plural number*. *Fysh v. Thorouggood*, Cro. Eliz., 623. This decision is cited by a late

writer as good law. Stark. on Slander, 343. It cannot be distinguished, in principle, from the case before us.

The plaintiff in error also contends, that the Court erred in rejecting certain evidence offered by him on the trial. He offered to prove, in cross-examining one of the plaintiff's witnesses, that it was generally known in the neighborhood, at the time the words were spoken, that there was a quarrel between him and the plaintiff; but the Court rejected the evidence. In this the Court was right. Whether there had been a previous dispute between the parties was of no consequence. Any angry or slanderous words spoken by the plaintiff of the defendant, at the time of the slander uttered by the defendant, might have been proved in mitigation of damages. But this proof must be confined to the [\*300] words spoken by the plaintiff at the time \*when the words complained of were spoken by the defendant. The defendant, if previously slandered by the plaintiff, had no right on that account to slander the plaintiff, but should have sued him at law for the slander. This doctrine was recognized in a very recent suit for a libel; and the Court said that the law was the same in cases of oral slander. *Wakley v. Johnson, Ryan & Moody*, 422. There was some other testimony, similar in its character to that we have just noticed, which was offered by the defendant, and correctly rejected by the Circuit Court.

It is further contended that as the third plea, which was demurred to, was adjudged to be bad, the jury should have been sworn as well to inquire of the damages upon the issue in law as to try the issues in fact. This is a mistake. Each of the pleas was pleaded in bar to the whole cause of action; and the plaintiff could recover nothing, unless he succeeded on the issues joined on all the pleas. The decision in his favour, therefore, on the demurrer to one of the pleas, did not entitle him to recover any damages whatever, to be assessed by a jury. Perhaps he might have been entitled to a judgment for the costs of that issue in law, had he chosen to ask it, but nothing more. The practice to swear the jury as well to try the issues

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in fact as to inquire of the damages upon the issue in law, obtains only in cases where the decision of the issue in law for the plaintiff entitles him to damages, without regard to the trial of the issues in fact, where, for example, he may take damages upon the judgment on demurrer, and enter a *nolle prosequi* as to the issues in fact. It is scarcely necessary to observe to the counsel for the plaintiff in error that this is not a case of that kind. There is another answer to the objection, that no damages were assessed upon the issue in law. It is this: That it is not for the defendant below to complain of the judgment, on the ground that the damages recovered against him are not sufficiently high.

The last ground relied on is that a new trial should have been granted on account of the insufficiency of the proof, and the large amount of the damages. This objection has no foundation. Several witnesses proved that the defendant had charged the plaintiff with being a hog thief, and with stealing hogs. The defendant undertook to prove the truth of the words in justification, and failed in his defense. He can have no right, therefore, under these circumstances, to com-  
[\*301] plain \*that the verdict is for the plaintiff, or that the damages of \$550 are excessive.

*Per Curiam.*—The judgment is affirmed, with costs.

*A. S. White* and *C. Dewey*, for the plaintiff.

*J. Whitcomb*, for the defendant.

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### KENT v. DAVID.

**SLANDER—PLEADING.**—To an action of slander for charging the plaintiff with having forged a certain instrument of writing, the truth was pleaded in justification. *Held*, that such a plea cannot be objected to, because it avers the forged instrument to be in the plaintiff's possession or destroyed. *Held*, also, that in a plea with such an averment, the instrument need not be so particularly described, as would be otherwise required.



Kent v. David.

**SAME.**—If one of the counts of the declaration, in such action, be for charging the plaintiff with *forging* an instrument of writing, a plea to the whole declaration, that the defendant *uttered* the forged instrument, &c., is insufficient.

**ERROR** to the *Rush* Circuit Court. *David* was the plaintiff below, and *Kent* the defendant.

**M'KINNEY, J.**—This is an action of slander. The declaration contains two counts. By the first, the defendant is charged to have spoken of and concerning the plaintiff, among others, the following words: "You (the said plaintiff meaning) forged the order, and I (the said defendant meaning) can prove it." "I (the said defendant meaning) never gave to you (the said plaintiff meaning), or *William Mansfield*, or any other person, an order in *William Hudelson's* name: you (the said plaintiff meaning) forged the order." The charge in the second count is, "You (the said plaintiff meaning) are guilty of forgery."

The defendant pleaded in justification: First, *actio non*, because he says that before the speaking, &c., of the several words, &c., to wit: on the — day of *May*, 1832, at, &c., the said plaintiff feloniously did falsely make, forge, and counterfeit a certain order, purporting to be an order from *William Hudelson* for seed corn, payable to bearer and directed to *Benjamin Gruwell*, and the same did utter and tender [\*302] to the said *Gruwell*, as \*a true and genuine order, to have the same received and paid to the said plaintiff as bearer thereof, as a true and genuine order from said *Hudelson* as signed by him, with intent to defraud the said *Hudelson*; which order he avers is in the hands and possession of the plaintiff, or destroyed, and cannot be produced, &c. Secondly, *actio non*, because he says that before the speaking, &c., of the words, &c., to wit: on the — day of *May*, 1832, at, &c., the said plaintiff feloniously did utter and tender for payment to one *Benjamin Gruwell* and others as true, a certain false, forged and counterfeit instrument in writing, purporting to be an order drawn and signed by *William Hudelson* for seed corn, payable to the bearer thereof,

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addressed for payment to said *Benjamin Gruwell*, who then had in his possession corn of the said *William Hudelson*, knowing the same to be forged and counterfeit, with intent to defraud the said *Benjamin Gruwell*; which said false, forged, and counterfeit instrument in writing, is in the hands of the plaintiff, or lost, so that the defendant cannot produce it in court, &c.

To each plea the plaintiff demurred specially; the demurrers were sustained, and, by consent, the Court assessed the damages and rendered judgment for the amount assessed.

A number of objections are presented by the demurrers to each plea. Among these, and most prominent, is the following: that a defendant in the action of slander, the charge being forgery, cannot justify on an instrument alleged to be in possession of the plaintiff, or lost.

This objection grows out of an assumed analogy between indictments for forgery, and pleas in justification of a charge of forgery; and on the ground of the inflexibility of the rule, that in indictments for forgery the instrument must be set out. In 1 Chitt. C. L., 234; 3 Ib., 1040; and 2 East's C. L., 975, 985, it is laid down as a general rule, that in indictments for forgery, the instrument forged should be described particularly. The rule, however, is found not to be without its exceptions. In the case of *The Commonwealth v. Houghton*, 8 Mass. R., 107, which was an indictment for forgery, among other reasons in arrest of judgment, it was said, "that the said indictment does not contain any precise or sufficient description of the bills or notes alleged to have been in the possession of the defendant, either according to the tenor or purport of the same, nor is any reason alleged why they are not so [\*303] described." The Court in giving its opinion, \*referring to the rule we have mentioned, remarked, "but there are causes which will form just and necessary exceptions to this rule; as when the forged instrument has been destroyed by the prisoner, or has remained in his possession; and perhaps in other cases, where the instrument cannot be produced, and there are no laches on the part of the government or prose-

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cutor. But, in every such instance in which the exception may be admitted, it must appear in the indictment what is the cause of the non-description of the instrument." In the case of *The People v. Kingsley*, 2 Cow. R., 522, the exceptions to the rule are recognized as correct, and it is held, that dates, sums, and times of payment may be omitted, and parol evidence given.

In the present case, the defendant justifies the speaking of the words charged, by alleging that the plaintiff feloniously made, forged and counterfeited a certain order, which he avers is in the hands and possession of the plaintiff, or destroyed, and can not be produced. If an order has been forged, and, in the attempt to pass it, suspicions are excited which induce its destruction as a supposed means of arresting a prosecution, or if, by accident, the order be lost, the offense of which the party was guilty, both in a moral and legal sense, is the same, and it would surely be a perversion of justice to say that the party becomes purified, and is permitted to recover damages from one who has spoken of his guilt. As the rule requiring, in indictments for forgery, that the instrument should be set out particularly, is subject to exceptions, and as the defendant has brought himself within the exceptions, admitting that the same strictness is necessary in a plea of justification as is required in an indictment for forgery, so far as this objection goes the pleas are good. As remarked, however, several objections were made to each plea. That examined is the only one to the first plea, upon which we are inclined to think the demurrer could have been sustained. The plea contains all the averments necessary to constitute a bar to the action, and we think the Circuit Court erred in sustaining the demurrer to it.

The second plea, on another ground, is insufficient. The plaintiff is charged by the defendant, as appears in the first count, with forging an order. By his second plea, an answer to the whole declaration, he justifies by alleging that the plaintiff uttered a forged order. The rule is settled that, in the action of slander, when a defendant justifies, he  
[\*304] must justify \*the specific charge laid. He is not

## Mann and Others v. Clifton.

permitted, when he has charged the commission of a particular act, to relieve himself from the liability he has incurred, by alleging the commission of some other act. The forging an order, and uttering an order, are distinct offenses. The second plea, therefore, purporting to answer the whole declaration, and not being responsive to the first count, is clearly insufficient. The demurrer was correctly sustained to this plea.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*J. Raviden*, for the plaintiff.

*O. H. Smith*, for the defendant.

## MANN and Others v. CLIFTON.

**NEW TRIAL—PRACTICE.**—If a new trial, moved for on account of the insufficiency of the evidence to support the verdict, be refused, and the refusal assigned for error, the impropriety of the verdict must appear beyond all doubt, or this Court will not interfere (*a*).

**SAME—AFFIDAVIT.**—On a motion for a new trial because of a witness' intoxication and consequent absence at the time of trial, the witness' affidavit of what he will swear to must be produced, or its absence accounted for (*b*).

**RECORD—JURY.**—If the record show that the jury were sworn, the omission of the words, "the truth to speak in the premises," is not material (*c*).

**ERROR** to the *Parke* Circuit Court.

**BLACKFORD, J.**—*Elias Clifton* brought an action of trespass *quare clausum fregit* against *Christopher Mann, William Mann, and Vance Rusk*. The complaint is that the defendants had broken the plaintiff's close, pulled down his house, and destroyed his furniture in the house. The defendants pleaded not guilty. The jury gave a verdict in favour of the plaintiff for \$900 in

(*a*) *Watson v. Allen*, 4 Ind., 537; *Archibald v. Johnson*, 7 Id., 266; *Harvey v. Quick*, 9 Ind., 258; *Bronson v. Hickman*, 10 Ind., 3; *Wolf v. The State*, 11 Ind., 231.

(*b*) *Priddy v. Dodd*, 4 Ind., 84; *McQueen v. Stewart*, 7 Ind., 535.

(*c*) *Applegate v. Boyles*, 10 Ind., 435; 4 Blackf., 189.



damages. A motion for a new trial, made by the defendants, was overruled, and a judgment rendered on the verdict.

The plaintiffs in error, who were the defendants below, contend that a new trial ought to have been granted in this cause, because of the insufficiency of the evidence and the excessive amount of the damages.

The evidence given in the cause is set out in the [\*305] record. The guilt of two of the defendants, \**Christopher Mann* and *Vance Rusk*, is proved by the positive evidence of several witnesses, who were present and saw them engaged in committing the trespass. The proof as to *William Mann*, the other defendant, is not so clear. There are two witnesses, however, who were well acquainted with him, and who were present when the trespass was committed. They say it was moonlight or starlight; that they saw the features of the trespassers; and that judging from his size and shape, they are almost sure that *William Mann* was one of them. There is another witness who says she saw all the trespassers, five in number; that she was not then acquainted with *William Mann*, but that she knew him at the trial; and that the size and shape of one of the trespassers corresponded with his. Besides these witnesses, there is a great deal of other testimony of a circumstantial nature; some of it tending to strengthen their evidence against the defendants, and some to weaken it. There was nothing proved, however, which contradicts these witnesses. It is impossible for this Court, under these circumstances, to interfere with the refusal of the Court below to grant a new trial, and to say that the verdict is unsupported by proof. It is at best a very delicate matter for an appellate court, not having heard the witnesses examined, to disturb the opinion of the jury and of the inferior court, relative to the weight of the testimony. To justify us in interfering in such a case, the insufficiency of the evidence must be shown beyond all doubt. That has not been done, by any means, in the suit before us.

The objection to the verdict, in consequence of the largeness of the amount, is not tenable. The trespass was committed in

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the dead of night, whilst the owner of the house and his wife were absent at a place of divine worship. It was on a Sunday night. The trespassers were armed with clubs and knives. The roof of the house was pulled down. The furniture was destroyed. The plaintiff's children were dragged out of bed, and put out of doors. In so aggravated a case, the damages found by the jury are far from being excessive.

It is further contended that a new trial should have been granted, on account of an affidavit made by one of the defendants. This affidavit states that *Lewis Smithey* was a material witness for the defendants; that they could have [\*306] proved by him \*that they were not present when the trespass was committed, and had nothing to do with it; that the defendants, when they were about to call this witness whom they had subpoenaed, discovered for the first time that he was very much intoxicated; that he had received no spirits from the defendants; that the witness can be procured at another term; and that the deponent knows of no other witness by whom the same facts can be proved.

One objection to this affidavit is, that the defendants did not procure the affidavit of *Smithey* himself as to what could be proved by him, nor show that such affidavit could not be obtained. Such an affidavit by the witness is required, when an application for a new trial is made on the ground of newly discovered evidence. *Denn v. Morrell*, 1 Hall, 382. We think the affidavit of the witness himself is as essential in the case before us, as in the one we have referred to. The affidavit of the party is but secondary evidence to show that the facts stated can be proved. The affidavit of the witness is the best evidence, and should be produced, or its absence accounted for. Another objection to this affidavit is, that it was the duty of the defendants, as soon as they discovered the witness to be intoxicated, to inform the Court of the fact. The Court might have then examined into the circumstances of the case, and upon their finding that the witness, without the defendants' fault, was not in a situation to be examined, they might have

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delayed the trial for a short time, or have continued the cause until the next term, according as the circumstances required.

The plaintiffs in error rely upon one other ground for a reversal of the judgment. That ground is, that the record does not state that the jury were sworn *the truth to say in the premises*. The entry in the record is, that the jurors (naming them) being called came, who being *elected, tried, and sworn*, after hearing the testimony, &c. This entry in the record is somewhat informal; but the informality is not, in our opinion, sufficient to require a reversal of the judgment. In a case where the record only stated that the grand jury and the officer attendant on the petit jury had been sworn, without giving the form of the oaths, it was held that, in the absence of any contrary proof, the legal oaths must be presumed to have been administered. *Hudson v. The State*, in this Court, [\*307] November term, 1824. In the cause \*before us, the record states the jury to have been sworn, and we will presume them to have been lawfully sworn, until the contrary is proved.

*Per Curiam*.—The judgment is affirmed, with 1 *per cent.* damages and costs.

*D. Wallace and J. Whitcomb*, for the plaintiffs.

*A. S. White and J. H. Farnham*, for the defendant.

## THE STATE v. BOUGHER.

INDICTMENT—GAMING.—In an indictment for gaming at a tavern or any other place, it is unnecessary to state the particular game played.

SAME.—The description of an offense in an indictment, in the language of the statute defining it, is sufficient (*a*).

ERROR to the Vermillion Circuit Court.

M'KINNEY, J.—Indictment for gaming. The indictment contains three counts. The first is founded on the 61st, and

(a) *Marble v. The State*, 11 Ind., 362; *Shilling v. The State*, 4 id., 443. See 5 Blackf., 155.

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the second and third upon the 62d section of the act relative to crimes and punishments. The indictment was quashed by the Circuit Court, on the motion of the defendant, and the case is before us by a writ of error sued out by the State.

The objection taken to the indictment is, that the charge it contains is too general; it not charging a particular game to have been played.

By the 61st section of the act referred to, it is enacted, "That every person who shall play at any game or games, for money or other valuable consideration, or who shall bet on the hands or sides of such as do play, at a tavern or place licensed to vend spirituous liquors by retail, or in any out-house or appendage of the same, shall, on conviction," &c.; and by the 62d section, "That every person who shall, by playing or betting at or upon any game or wager whatsoever, either lose or win any sum of money or article of value, shall, upon conviction," &c.

The first count charges, "that the defendant on, &c., in a house attached to a place licensed to vend spirituous liquors by retail, &c., did, &c., play at and upon a certain unlawful game, \*at and with cards, with, &c., then and there being, for money, to-wit," &c. By the second count it is charged "that the defendant on, &c., did then and there by unlawfully playing and betting upon an unlawful game, at and with cards, with, &c., unlawfully win a certain sum, &c., to-wit," &c. The third count charges "that the defendant on, &c., did then and there by unlawfully playing and betting upon an unlawful game, at and with, &c., unlawfully lose a certain sum, to-wit," &c.

Neither of the sections upon which the several counts are founded, point out the particular games which are prohibited, nor do they confine the prohibition to games played with cards. The prohibition is general, and the penalties of the statute attach, not by playing a particular game, but, under the 61st section, by playing at a game or games, for money or other valuable consideration, or betting on the hands or sides of such as do play, "at a tavern or place licensed," &c., and under the



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62d section, by losing or winning any sum of money or article of value, by playing or betting upon any game or wager whatsoever; consequently the offense is consummated, without reference to the particular game played. .

As the offense does not consist in playing or betting on any particular game, it would seem that to give validity to an indictment, and sanction a conviction, it is unnecessary to aver a particular game to have been played. No rule is better settled than that which regards as sufficient in an indictment, the averment of an offense in the language of a statute which creates it. The indictment before us, being drawn in conformity to that rule, is good.

It is, however, objected, that the offense charged is not so specific as to enable an acquittal or conviction to be pleaded in bar to another prosecution. If such could be regarded as correct, the objection would clearly be tenable; but its fallacy is obvious, when it is recollected that the plea of former acquittal or conviction consists partly of matter of fact and partly of matter of record; 1 Chitt. C. L., 458; and that if the charge be the same, though the indictment may differ in immaterial circumstances, the defendant may plead his previous acquittal. Ib., 453. It is true, that if the indictment contained an averment of a particular game having been played, unless the proof met the averment, the indictment could not be sustained;

Arch. Cr. Pl., 295; but it does not from this follow, [\*309] that the averment \*of a particular game is required, when the statute punishes the offense of playing, &c., and not the offense of playing a particular game.

We are, therefore, of opinion that the Circuit Court erred in quashing the indictment, and discharging the defendant.

BLACKFORD, J., being indisposed, was absent.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

W. Herod, for the State.

J. Whitcomb, for the defendant.

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## JORDAN v. TURNER.

**CHATTEL MORTGAGE—POSSESSION BY MORTGAGOR.**—A mortgaged certain goods to *B* to secure the payment of a *bona fide* debt, but continued in possession of the goods with the mortgagee's permission, and used and disposed of them as his own. The mortgage stated that the goods were delivered to the mortgagee in his own right, subject to be redeemed on the payment, &c. *Held*, that under these circumstances, the mortgage was fraudulent and void, as to the mortgagor's creditors (*a*).

ERROR to the *Vigo* Circuit Court.

STEVENS, J.—On the 10th day of *July*, 1830, *Turner*, the defendant in error, became the owner of two judgments, on the docket of a justice of the peace, against one *Moses Chandler*, by purchase, amounting in the whole to the sum of eighteen dollars and fifty cents; and on that day, *Chandler*, for the purpose of securing the payment of those judgments to *Turner* on the 1st day of *February*, 1831, made a bill of sale of some goods and chattels to *Turner*. This bill of sale, after stating the amount of the judgments, and the purchase of them by *Turner*, says, "Now, for the better security of the above named judgments, I, *Moses Chandler*, do deliver to said *Turner* a certain three years old sorrel stud colt," &c., also, "three two years old steers, and three one year old steers, and one muley black and white cow," also, "one brown mare. The above I deliver to said *Turner*, *bona fide*, in his own right, subject to be redeemed by the payment of the above named judgments, with interest, \*by the 1st day of *February* next." This property was left by *Turner* in the possession of *Chandler*, and *Chandler* used it, traded and trafficked upon it, and treated it as his own. The three one year old steers, which were worth about five dollars each, he sold, and appropriated the proceeds to his own use. The three two years old steers he sold for sixteen dollars, and appropriated the money to his own use. The cow was worth about

(a) See *Watson et al. v. Williams et al.*, 4 Blackf., 26.

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nine dollars, and he appropriated her to his own use. The mare was worth about twenty dollars, and he used and possessed her as his own until she died. The horse was worth about forty dollars, and he possessed and used him as his own, and finally exchanged him for the horse in question, which is worth about fifty dollars.

*Jordan*, the plaintiff in error, recovered a judgment against *Chandler* for the sum of thirty-seven dollars and fifty cents, besides interest and costs, on which an execution issued on the 24th day of *January*, 1831, and on the next day was levied on the aforesaid horse, as the personal goods of *Chandler*. *Turner* claimed the horse as his property, under the aforesaid bill of sale, on which claim a trial in the *Vigo* Circuit Court was had, and the horse found to be *Turner's* property under the bill of sale, and not subject to *Jordan's* execution.

The only question before the Court is, whether the horse in question is subject to *Jordan's* execution, as the personal goods of *Chandler*, or not?

*Turner*, the defendant in error, by his counsel, insists that his claim is *bona fide*, legal and valid against the creditors of *Chandler*, because he holds the property under a mortgage, and not as a pledge, and that a mortgage is good and valid, although the goods remain in the possession of the mortgagor, and that the equity of redemption, in mortgaged goods and chattels, can not be seized and sold on execution; and, further, that the interest of the mortgagee in the goods becomes absolute at law, if they are not redeemed at the appointed time, and that, in this case, the day of payment is now past without payment being made, and therefore his interest in the goods is absolute at law.

The law is well settled that there is a wide difference between a pledge and a mortgage of personal goods. A pledge is a deposit of goods redeemable on certain terms, either with or without a fixed day of redemption. Delivery must accompany a pledge, and is, in all cases, essential to its validity.

[\*311] The \*general right of property of the pledgor in the goods does not pass to the pledgee, and the pledgee only has a special property in them; and so long as the

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pledgor's right to the pledge remains unextinguished, his interest is liable to be sold on an execution, and the purchaser under the execution succeeds to all the pledgor's rights, and is entitled to redeem the pledge. *Kemp v. Westbrook*, 1 Ves. sen., 278. A mortgage is quite different; it is a sale of the goods, and a conveyance of the title to the mortgagee, upon condition, and becomes an absolute interest at law if the condition be not performed, and, in certain cases, is valid without delivery: and it has been long the established doctrine in *England*, and we think it is good law here, that the equity of redemption in mortgaged goods and chattels can not be sold on execution. The creditor's remedy in such cases is by a bill in equity.

There is, however, in every disposition of goods and chattels, an essential circumstance which must never be lost sight of, and that is, that the transaction must be *bona fide*, and perfectly free from fraud or collusion. The common law makes void all acts that depend upon fraud or collusion. The genius of the common law opposes itself to every species of fraud or collusion, but is tender of presuming the facts from circumstances, and requires every thing to be made manifest or plainly inferable. Therefore, with a view to enforce the principles of the common law, several statutes have made void all fraudulent and collusive conveyances, as against creditors and purchasers. The object of these statutes is to aid the common law in ferreting out fraud and collusion; and the expounders, by legal adjudications, have given them a very liberal construction, so as to supply the defect of the common law, and have extracted from them certain operative and beneficial rules for the suppression of fraud. These adjudications have fixed certain transactions and things as evidence of fraud, and have established certain requisites and landmarks, by which to test the dealings of men. These evidences of fraud, and these required landmarks, may sometimes operate unjustly on the honest dealings of men, and produce some inconvenience, yet the weight of inconvenience is trifling when compared with the salutary efficacy and influence which they have in regulating certain transactions.



These adjudicated rules apply themselves to the condition of things as they are found, and are so moulded as to [\*312] correspond \*with their nature, as they generally exist among men, and in this respect, have made a material and obvious distinction between real and personal property as possession. Since the introduction of conveyances in writing, and transfers through the medium of uses, the title to real estate is only evidenced by the title papers; the visible occupation and use furnish no evidence of the possessor's title. But possession and use of personal goods are the strongest index of ownership. There is no way by which third persons and strangers can come at the knowledge of who is the owner of personal things, but by seeing in whose possession they are: there is no other general medium for deciding on the ownership of such property. Possession being evidence of title to, and the ownership of, personal goods, it follows as a legal rule of decision, that the visible possession and control by the seller of goods and chattels, after he has parted with his property in them, with the consent of the buyer, is evidence of **an intention to deceive third persons.**

It is settled among the early principles of the common law, that if a conveyance be made, purporting to be a conveyance of personal goods immediately and absolutely, that it is void as to creditors of the vendor, unless the possession accompanies the conveyance. Hence it is an established rule, that an absolute conveyance of personal goods, the possession of which remains with the vendor, is of itself sufficient evidence of fraud as to creditors. It is not merely evidence of fraud from which fraud may or may not be inferred, but it is in law language of itself sufficient evidence of fraud, and from which the law exclusively infers that there is fraud, whether intended or not, so far as the creditors of the vendor are concerned. This conclusion, however, of fraud, arising on the fact of possession by the vendor, being a legal presumption, is not unconditionally absolute: it may be, in certain cases, rebutted and explained by legal evidence, if such evidence and such retaining of possession by the vendor, are consistent with the contract; as, if

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it be a conditional sale, or a mortgage, or if it is part of the original contract, that the vendor should retain possession until after a default should be made in the condition of the sale; or where the situation of the parties or the goods is such that immediate possession cannot be taken, as in the case of a ship at sea, or a growing crop; or where from any other legal and *bona fide* circumstance, immediate possession cannot [\*313] be taken. In all \*such cases, the possession by the vendor after he has parted with his property in the goods, is consistent with the conveyance, and may be explained by parol evidence; but no evidence can be admitted to explain a possession which is inconsistent with the contract.

The defendant in error, in this case, claims under a mortgage, the consideration of which is supposed to be correct and valuable, but the plaintiff in error contends that the mortgage is not *bona fide*, that it is, as to creditors of the mortgagor, fraudulent and void. As to the possession of mortgaged goods, a mortgage stands on the footing of other conveyances of personal things, and possession must accompany the conveyance, unless there is some contract or circumstance, by which the mortgagor can retain the possession consistently with the contract. In the cases of *Harris v. Sumner*, 2 Pick., 129, and *Murray v. Riggs*, 15 Johns. Rep., 571, it is decided, that if a creditor takes a conveyance from his debtor of personal goods, to secure the payment of his debt, this being his only motive, but at the same time for the benefit of his debtor, inserts provisions that delay, hinder, or defraud other creditors, the conveyance is bad. In the case of *Clow v. Woods*, 5 Sergt. & Rawle, 275, it was held in the case of a mortgage on personal goods to secure the payment of debts, that if the mortgagor remained in possession of and used the goods, they were subject to the execution of another creditor. In the cases of *Homes et al. v. Crane*, 2 Pick., *Haskell v. Haskell*, 3 Green., 425, it is decided, that where a debtor sells his personal effects, such as machinery, &c., to his creditor, with a condition in the bill of sale, to be void on the payment of the debt, and the creditor takes possession of the goods and then leaves them to the

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debtor, such bill of sale amounts to a mortgage, and the after possession of the debtor is *prima facie* evidence of fraud. In the case of *Paget v. Perchard*, 1 Esp. R., 205, the creditor took possession under his bill of sale, but suffered the vendor to sell the property in the usual way of his trade, and such possession was adjudged colorable, and the bill of sale void. In the case of *Wordall v. Smith*, 1 Camp., 332, Lord *Ellenborough* said: "There must be a *bona fide*, exclusive, and substantial change of possession, under an assignment, or it is fraudulent as against creditors. A concurrent possession with the assignor is colorable. The possession must be exclusive."

[\*314] \*In the case under consideration, the mortgagor retained the possession of the goods inconsistently with, and contrary to the face of the mortgage, and such possession, unexplained by evidence, is, of itself, sufficient evidence of fraud as to creditors. No evidence was offered to explain that possession, and show that it was consistent with the mortgage; and it is, at least, doubtful whether such evidence could have been received if it had been offered. Such evidence would contradict the face of the mortgage, the mortgage being positive and direct that the mortgagor, at the time and place of making the mortgage, delivered the goods to the mortgagee to hold as his own, in his own right, subject to be redeemed, &c. We incline to think that such evidence could not be received under this mortgage, if it were offered. It is, however, wholly immaterial whether such evidence be received or not. The case does not stop at that point; the mortgagor not only kept possession of the goods, but he also used and treated them as his own; converted them to his own use; traded and trafficked on them as his own; sold them as his own, and converted the proceeds to his own use. These proceedings are not only contrary to the face of the mortgage, but are inconsistent with, and in direct opposition to the intention, spirit and meaning of it, and render it wholly fraudulent and void as to creditors, consequently, the horse in question is subject to the execution of *Jordan* (1).

Carter v. Buckner.

BLACKFORD, J., being indisposed, was absent.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*C. Dewey*, for the plaintiff.

*J. Farrington*, for the defendant.

(1) Vide note to *Chinn v. Russell*, Vol. 2 of these Rep., 174; *Watson et al. v. Williams et al.*, and *Hankins et al. v. Ingols*, in this Court, *May term*, 1835, post.

### CARTER v. BUCKNER.

**EVIDENCE—PRACTICE.**—The admissions made by a party, examined under oath on a trial before a justice, can not be proved in the Circuit Court, on appeal, the party being in Court on the trial of the appeal, and not there examined (*a*).

[\*315] \*ERROR to the *Vermillion* Circuit Court. *Buckner* was the plaintiff below and *Carter* the defendant.

M'KINNEY, J.—Assumpsit before a justice of the peace on a promissory note. Plea, the want of consideration. Judgment for the plaintiff. On appeal to the Circuit Court, the cause was submitted to the Court and judgment rendered in favour of the plaintiff for thirty-two dollars and fifty cents. To reverse this judgment, the case is before us by writ of error.

From a bill of exceptions, it appears that *Carter*, the defendant below, to prove the want of consideration, introduced a witness to prove the admissions of the plaintiff, made under oath on the trial before the justice of the peace, he having been examined as a witness touching such want of consideration; that the Circuit Court refused to hear the witness, the plaintiff being present in court on the trial of

(a) See *Carter v. Edwards*, 16 Ind., 238; *Rhode v. Louthain et al.*, 8 Blackf., 413.



the appeal. The refusal of the Circuit Court to hear this testimony is complained of as error.

Either party, plaintiff or defendant, may be made a witness by statute, in actions of debt or assumpsit before a justice of the peace, and in the event of appeals in such cases, the provisions of the statute are extended to the Circuit Court. It was as competent to the defendant to call upon the plaintiff to answer under oath in the Circuit Court, as it was before the justice of the peace. This provision of the statute constitutes a change of the common law, and, restricted as it is, is found by experience to be assistant to the advancement of justice. The settled rules of evidence are, however, unchanged by the statute, and will apply in its application. Perhaps no one of the rules is more strictly enforced, than that which requires the best evidence the nature of the case will admit of, to be produced. The rule sustains the Circuit Court in its exclusion of the testimony offered. The plaintiff was in court, and could have been required to answer to the plea on oath. This was not done, but a witness is offered to prove his admissions made under oath before the justice. This was inadmissible.

Other admissions or confessions of the plaintiff would have been received, or if he had been examined in the Circuit Court, it would have been competent to have proved contradictions, discrepancies, or variances occurring in his examination before the justice of the peace, and that in the Circuit Court.

It is true, the admissions of a party may be given in [\*316] evidence \*against him. These admissions may either be *in pais* or of record; they however relate to the party, without violating any rules of evidence which apply when the party is constituted by statute a witness.

It is clear that the Circuit Court was correct in excluding the testimony.

BLACKFORD, J., being indisposed, was absent.

*Per Curiam*.—The judgment is affirmed, with costs.

J. Whitcomb, for the plaintiff.

J. Farrington, for the defendant.

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 Bryan v. Fisher.
 

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## BRYAN v. FISHER.

**LANDLORD AND TENANT—RENT—COVENANTS.**—*A* leased to *B*, for a number of years, a dwelling house and two lots, at a certain annual rent, and covenanted in the lease to make some additions to the buildings, and furnish some furniture for the house. The tenant entered into and occupied the premises, and the landlord sued for two years' rent. *Held*, that the landlord's not having made the additions, &c., as agreed on, was no bar to the action (*a*).

ERROR to the *Wayne* Circuit Court.

M'KINNEY, J.—Covenant on the following instrument of writing:

"Articles of agreement made and entered into this 26th day of *April*, 1830, between *Henry Bryan* of the one part, and *Elijah Fisher* of the other part, both of *Wayne* county and State of *Indiana*, witnesseth, that the aforesaid *Henry Bryan*, on his part, agrees to let the aforesaid *Elijah Fisher* have the house and two lots that he, the said *Bryan*, now occupies, with all the buildings thereon, except the old house on the west end of said lot, and the ground it stands on; and, further, the said *Bryan* agrees to furnish the said *Fisher* with a comfortable kitchen for the use of said house, also, a crane, also, to make a bar, and furnish the bar room with six chairs, also, the dining table, kitchen table, and table that stands in the bar room, for the term of five years, with the privilege of giving up said possession to said *Bryan* at the expiration of any one year of said term. And the aforesaid *Elijah Fisher* is to have possession of said premises on the 1st day of *June* next [\*317] ensuing; and said *Fisher* agrees to pay to said \**Bryan* sixty-five dollars for each year he, the said *Fisher*, occupies said premises, to be paid at the expiration of each year; and the aforesaid *Fisher* is to take good care of the above property."

The plaintiff, in his declaration, in which he recites the

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(*a*) *Spencer v. Burton*, 5 Blackf., 57; *Clifford v. Smith*, 4 Ind., 377; *Pickens v. Bozell*, 11 Id., 275.

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articles of agreement, avers that although he has well kept his covenants with the defendant, and faithfully delivered to him the possession of the said premises on the said 1st day of *June*, 1830, which possession the defendant retains, and ever since has retained undisturbed, and also furnished the defendant with a comfortable kitchen on said premises, &c., a crane, also made a bar, and furnished the bar room with six chairs, a dining table, kitchen table, and the table that stood in the bar room, yet says that the defendant has wholly failed to keep his covenant with the plaintiff in this, to wit, that the defendant hath not paid the plaintiff the sum of sixty-five dollars for each year he, the said defendant, occupied the said premises, or any part thereof, and avers that the defendant has occupied the premises two entire years, and that he has broken his covenant in this, that he has not taken good care of the premises. The plaintiff proceeds to designate and aver particular instances of waste and injury done to the premises, &c.

The defendant craved *oyer*, and demurred to so much of the declaration and its breaches as relates to his covenant to take good care of the premises. The demurrer was sustained. He then pleaded three pleas, to the two first of which replications were filed by the plaintiff, on which there were issues to the country. To the third plea the plaintiff demurred specially; the demurrer was overruled, and final judgment rendered in favour of the defendant.

The assignment of errors presents for our consideration the correctness of the judgment of the Circuit Court in overruling the demurrer to the third plea, and rendering final judgment in favour of the defendant. We will confine our remarks to the third plea, as the previous proceedings in the cause are undoubtedly correct. The plea is exceedingly prolix, resulting without doubt from the view taken of his defense by the defendant, and forbids our doing more than noticing the grounds upon which it is relied on as a bar to the action.

The defendant, as to so much of the covenant and declaration as relates to the non-payment of rent at sixty-five dollars *per annum*, says *actio non*, because he alleges that by the

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[\*318] deed the \*plaintiff was bound to let him have the house and two lots, &c., designated in the deed, and also to furnish forthwith a comfortable kitchen, &c., for the use of the premises, for the term of five years from the 1st day of *June*, 1830, for and in consideration of the sum of sixty-five dollars, in annual payments; whereby it is averred "the use and occupation of all the buildings on the said lots for the term aforesaid, and the immediate furnishing of the said kitchen, and other articles in said deed of covenant mentioned, became and was a condition precedent in the said covenant, to be first performed by the said plaintiff, before the said defendant was bound to do and perform any thing on his part, or to pay the said rents." The defendant further avers, that the plaintiff did not furnish or allow him to use and enjoy all the buildings on said premises, or keep him in peaceable possession of the same, or erect said new kitchen on said premises as aforesaid, forthwith; "but, on the contrary, that the plaintiff, soon in the year 1830, tore down forcibly and removed off and from the said two lots so leased as aforesaid, a back building to the principal front building on said lots, and forcibly used and occupied the same during all the time elapsed since the date of said covenant to this time, by renting the same for thirty dollars, and receiving said rents, and for a long time, to wit, three months from the said 1st of *June*, 1830, refused to build said kitchen on said premises;" that he forcibly used and occupied the same, &c.; that during the time he has been in possession of the premises aforesaid, the plaintiff has hindered and molested him in the quiet and peaceable possession of the same, &c.

We think the plea entirely indefensible, and obnoxious to additional objections to those taken to it by the special demurrer. It presents distinct and substantial matters in bar of the action, neither of which, singly pleaded, would be sufficient. Facts should be pleaded, and not conclusions of law. From facts properly presented, deductions of law are drawn and applied to the case. Upon independent covenants, each party is entitled to an action, and when a landlord enters upon the



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possession of a tenant and commits a trespass, he is liable as a trespasser. Waiving, however, other objections to the plea, we will examine it only so far as it is relied upon as a bar, by its showing a condition precedent, or rather from the assumption that the covenants between the parties are dependent.

[\*319] \*The plea assumes that the agreement contains covenants to be performed by the plaintiff, the performance of which is essential to a recovery against the defendant, and that, therefore, the non-performance of such covenants, regarded as conditions precedent, would be a bar to the action. It is correct, as a general rule, that if there be in an agreement a condition precedent, its performance is necessary to entitle a party to recover. It is, therefore, material to inquire, whether the articles of agreement upon which this action is brought, contain a condition precedent or not?

In determining whether covenants are independent or dependent, certain rules have been laid down, enabling courts to reach the intention and meaning of the parties, when the instrument in its terms is vague and obscure: 1. If a day be appointed for the payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for the performance of that which is the consideration of the money or other act. 2. When a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. The cases of *Boone v. Eyre*, 1 H. Bl. Rep., 273, note, and *Campbell v. Jones*, 6 T. R., 570, are cited as illustrations of the latter rule. From these cases, with which *Harden v. Hayden*, 2 Marsh. R., 359, and *Payne v. Bettisworth*, ib. 427, are accordant, it is settled

“that where a party has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permitted to enjoy that part, without either paying or doing anything for it; and moreover, as remarked in *Campbell v. Jones*, the damages sustained by the parties would be unequal, if such covenant were held to be a condition precedent.” The law thus settled, does not in its operation leave the [\*320] party, who is compelled to perform \*his agreement, without a remedy, for he can recover damages for a loss in not having received the whole consideration.

Applying either of the rules to the agreement in this case, it is demonstrable that the covenants must be regarded as independent, and the plea consequently bad. Here, the giving of the possession of the house and lots was the principal covenant on the part of the plaintiff; it stands distinct; the inducement to the covenant of the defendant, and the furnishing the kitchen, crane, &c., is a part only of the consideration of the defendant's contract, contributing certainly to the enjoyment of the premises, but without which the premises are of value. The defendant was to have possession on the 1st day of *June*, and the plaintiff was to furnish a kitchen, &c., but at what time is not mentioned; the law would require within a reasonable time. If that time be unreasonably and injuriously to the interests of the defendant, protracted, he has his remedy by action. It would form only a part of the consideration of the defendant's contract, and not operate as contended a bar to the plaintiff's action. Suppose the crane not to have been furnished, or either of the tables mentioned, should the defendant have the enjoyment of the premises two years and not be liable for rent? Such a conclusion is palpably repugnant to the feelings, and surely in conflict with the intention and meaning of the parties. If these secondary objects, promotive of the enjoyment of the defendant, were not provided, when, in the interval between the execution of the articles of agreement and the 1st of *June* ensuing, time sufficient may have been

Bryan v. Fisher.

afforded, why take possession unless he looked to his remedy by action, or why continue in possession two years as admitted?

By either of the rules for expounding contracts, the defendant is concluded. By the first, from his covenant to pay sixty-five dollars rent, annually, during the term of five years, he continuing in the possession of the premises; and by the second, because the plaintiff's undertaking to furnish the kitchen, &c., constituted only a part of the consideration of the defendant's contract. The plea being insufficient, we are of opinion that the demurrer should have been sustained, and the pending issues tried.

[\*321] \*BLACKFORD, J., being indisposed, was absent.

*Per Curiam*.—The judgment is reversed with costs.

Cause remanded, &c.

*J. Rariden and O. H. Smith*, for the plaintiff.

*M. M. Ray*, for the defendant.

(1) The assignee of *Thomas Cresswell*, a bankrupt, brought an action of covenant against *H. R. Cresswell* on an agreement, by which *T. C.* assigned to *H. R. C.* a certain *Scotch* fishery, and agreed not to interfere in the business so assigned; and in consideration of the said assignment and covenant, *H. R. C.* agreed to pay *T. C.* an annuity of £250, by quarterly payments. Breach, the non-payment of £62 10s for the quarter ending, &c. Plea, that before the £62 10s. became due, *T. C.* interfered with and acted in the trade assigned to the defendant. Demurrer to the plea.

*Park, J.*—"In this case our judgment must be for the plaintiff. Whatever confusion may prevail among the earlier cases on the subject of dependent or independent covenants, the rule seems now to be well understood, as ably and clearly laid down by Mr. Sergt. *Williams* in his note to *Pordage v. Cole*, 1 Wms. Saund., 320 b; namely, 'That where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant, without averring performance in the declaration.' In the present case, the engagement not to interfere in the *Scotch* fish business formed only a part of the consideration for the defendant's covenant. Another and most material part was the assignment of the *Scotch* fishery, and the case falls directly within the principle established by *Boone v. Eyre*. There, the plaintiff having conveyed to the defendant the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes thereon, and having covenanted that he had a good title to the whole, and that the defendant should quietly enjoy, the defendant covenanted to pay an annuity to the plaintiff on his performing every thing

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on his part to be performed. In an action for non-payment of the annuity, the defendant pleaded that the plaintiff was not, at the time of the conveyance, legally possessed of the negroes, and so had not a good title to convey; but the plea was held ill on demurrer; the court of king's bench observing, that if such a plea were allowed, want of title to any one negro would bar the action. So here, if *T. Cresswell* had sold only one barrel of fish, it might with equal propriety be urged as a bar to the present action."

The other cases cited and commented on by the judge, are *Campbell v. Jones*, 6 T. R., 570; *Glazebrook v. Woodrow*, 8 T. R., 366; *Havelock v. Geddes*, 10 East, 555; *Fothergill v. Walton*, 2 B. Moore, 630. And he concludes as follows: "The substantial part of the agreement, in the present instance, is the assignment of the fishery in *Scotland*; I am therefore of opinion, that, according to all the cases, our judgment must be for the plaintiff."

The other judges expressed similar opinions and referred also to *Kingston v. Preston*, Doug., 690, and *The Duke of St. Albans v. Shore*, 1 H. Bl., 270. And *Gaselee, J.*, said: "The annuity to be paid by the defendant was in consideration of two things: one, the assignment of the fishery in *Scotland*; the other, *T. Cresswell's* giving up that branch of business. Upon [\*322] the authority of \*all the cases, therefore, the relinquishment of the business not forming the whole of the consideration for the payment of the annuity, the covenant not to interfere must be esteemed an independent covenant." *Carpenter, assignee of T. Cresswell v. H. R. Cresswell*, 4 Bingh., 409.

## HAYS and Others v. LANIER and Others.

**PLEADING—PARTIES**—An unincorporated company must sue in their individual names, and not in the name of the firm (a).

**SAME.**—*Seemle*, that a promissory note payable to a firm may be filed under the statute, instead of a formal declaration, if the writ contain the names of the partners (b).

ERROR to the *Morgan* Circuit Court.

**STEVENS, J.**—By the 4th section of the act of 1833, amending the act regulating the practice at law, it is declared that in actions at law for the recovery of specific sums of money upon

(a) *Davis v. Hubbar* 1, 4 Blackf., 50; *Hughes v. Walker*, Id., 50; 5 Id., 213; Id., 255; 10 Id., 218.

(b) *Thompson v. Coquillard*, post, 437,



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bills or promissory notes, it is not necessary to file a formal declaration, but that the filing of such notes in the clerk's office, shall be a sufficient foundation for the suit, and process shall issue thereon, &c.; and to which the defendant may appear, &c.

Under this statute, a company of merchants trading under the style and firm of *Stapp, Lanier & Co.*, brought the action now under consideration, without a declaration, against *James W. Hays* and *Thomas Heck*, merchants, trading under the style and firm of *Hays & Heck*, and *John Wheatly*, upon a promissory note in these words and figures: "\$374.73. Three months after date, we or either of us promise to pay *Stapp, Lanier & Co.* three hundred and seventy-four dollars and seventy-three cents, with interest from date, for value received. *Hays & Heck, John Wheatly.*"

The process which issued against *Hays & Heck* and *John Wheatly* is spread upon the record by a bill of exceptions, and is in the name of *Stapp, Lanier & Co.*, without setting out the individual names of the several parties, or in any way showing who the persons are that compose the firm of *Stapp, Lanier & Co.* The defendants appeared to the process and moved to quash the writ, but the motion was overruled. They then filed a general demurrer, which was also overruled, [\*323] and a final \*judgment rendered that *Stapp, Lanier & Co.* recover, &c., without stating who they were.

The only question before this Court is, whether the defendants in error can, in their collective capacity, under the style and name of *Stapp, Lanier & Co.*, prosecute and maintain this action?

There is no principle more certainly and satisfactorily settled than that, in all actions, the writ and declaration must both set forth, accurately, the christian and surname of each plaintiff and each defendant, unless the party is a corporation, known to the law by an artificial name, and is authorized to sue and be sued in such corporate name. This rule of law and practice is sustained by reason, justice, and the highest authorities. In the case now before us, the defendants in error are not a

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corporation known to the law by the artificial name of *Stapp, Lanier & Co.*; they are natural persons, and must sue in their individual names. It is also equally well settled that in all cases of contracts, if it appears upon the face of the writ or declaration that there are other obligees who are not named, it is fatal on demurrer. In this case, the note and writ both show that there are other obligees who are not named; this is fatal on demurrer. 1 Chitt. Pl., 7; 2 Johns. Cas., 384; *Bentley et al. v. Smith et al.*, 3 Caines' R., 170; *Anderson v. Martindale*, 1 East, 497.

It is, however, said that the statute authorizes such proceedings as these. That appears to us to be an entire mistake. The statute dispenses with a formal declaration, but it does not dispense with the parties to the suit. Suppose the payees to be idiots, lunatics, or infants, does the statute remove their disabilities, and authorize them to sue in their own names, without committees, guardians, &c.? The case is a very plain one; the statute has nothing whatever to do with the subject of the parties to the suit. Suppose the writ in this case, instead of issuing in the form it did, had issued in the name of *Milton Stapp, James F. D. Lanier, &c.*, partners, trading under the style and firm of *Stapp, Lanier & Co.*, would there have been any difficulty? It is apprehended that there could not have been any; the record, proceedings and judgment could have followed the writ, and all might, perhaps, have been correct (1).

BLACKFORD, J., being indisposed, was absent.

*Per Curiam*.—The judgment is reversed, with costs.

*P. Sweetser* and *B. Bull*, for the plaintiffs.

*C. Fletcher*, for the defendants.

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 Judah, Administrator, v. Dyott.
 

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[\*324] \*JUDAH, Administrator, v. DYOTT.

DEMAND.—An action does not lie against an agent or factor for not accounting until after a demand to account (a).

LIMITATIONS.—The statute of limitations in such action does not begin to run until a demand has been made.

PLEADING.—*Querre*, whether in actions against agents or factors for not accounting, the contract should not be specially declared on?

### ERROR to the Marion Circuit Court.

BLACKFORD, J.—*Indebitatus assumpsit* by Dyott against Judah, administrator of Brandon. Two counts: one for goods sold and delivered to the intestate; the other, for money had and received by the intestate to the plaintiff's use. There was a third count, stating a promise by the administrator to pay the debt, but to that count a *nolle prosequi* was afterwards entered. Two pleas, the general issue, and the statute of limitations. Issue on the first plea. Replication to the second plea and issue. Verdict for the plaintiff below. Motion for a new trial overruled, and judgment on the verdict.

The proof was that Brandon had a certain quantity of medicines in his possession belonging to Dyott, which the former had received from the latter to be sold on a commission of twenty-five *per cent.*, and that Brandon sold the principal part of the medicines, if not the whole, before his death.

This evidence was not sufficient to maintain the action. Brandon was merely the agent of Dyott for the sale of the medicines, and was not liable to his principal for the proceeds of the sale, without a special demand previously made; nor is his administrator liable, without a previous demand on himself or his intestate. When goods are received to be sold on commission, the law implies a contract, if no other be expressed, that the agent shall not be liable for any amount received for the sale, until a demand of payment has been made. It is true,

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 (a) 2 Ind., 325; 13 Id., 206.

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positive evidence of the demand is not always required. The circumstances proved may sometimes be such as will authorize a jury to presume a demand. But in the case before us, there was no kind of evidence that a demand, either on the intestate or on his administrator, had been made before the commencement of the suit; nor were there any circumstances proved from which any such demand could be presumed. The action, therefore, was not sustained by the evidence. *Topham v. Braddick*, 1 Taunton, 572; *Armstrong v. Smith*, May term, 1833 (1).

The statute of limitations was pleaded in this cause, but the record presents us with no question relative to that plea which it is necessary to decide. It may not be improper, however, to observe that as the cause of action does not accrue in cases like the present until a demand, the statute of limitations can not be said to commence running until after the demand. *Topham v. Braddick*, 1 Taunton, 572.

Whether, in these cases against a commission merchant, the contract should not be specially declared on, or whether the evidence rendering him liable may be introduced under a general count, is a question which we are not called on now to decide. We conceive that, let the point as to pleading be what it may, the question as to evidence is very clear. The plaintiff, having failed to prove a demand of the money sued for, was not entitled to the verdict he obtained, and the new trial applied for by the defendant ought to have been granted.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*C. Fletcher*, for the plaintiff.

*S. Merrill* and *J. H. Scott*, for the defendant.

(1) Ante, p. 251, and citations in note



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Hogg v. The State.

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[\*326]

\*HOGG v. THE STATE.

**INDICTMENT—LARCENY.**—An indictment for larceny, charging that the goods stolen were the property of *A*, is not sustained by proof that they belonged to *A* & *B* as partners, and that they were, at the time of the larceny, in *A*'s possession (*a*).

**ERROR** to the *Clark* Circuit Court.

**STEVENS, J.**—*Hogg* was indicted for feloniously stealing, taking and carrying away two barrels of whisky, of the value of nineteen dollars, of the goods and chattels of one *James C. Caldwell*, and was tried upon the plea of not guilty, found guilty, and sentenced to two years' imprisonment at hard labor in the State's prison, &c.

Upon the trial of the issue before the jury, a question arose upon the evidence whether the goods and chattels stolen were the individual and sole goods and chattels of the said *Caldwell*, as charged in the indictment, or whether they were owned by said *Caldwell* and one *Fulton*, as partners. The defendant's counsel then asked the Court to charge the jury that if they found that the said *Caldwell* & *Fulton*, as partners, were the owners of the said goods and chattels, and not the said *Caldwell* alone, as charged in the indictment, they should acquit the defendant, which charge the Court refused to give, but charged the jury that although they might find the ownership of the goods to be in the said *Caldwell* & *Fulton*, as partners, and not in the said *Caldwell* alone, yet if they found that they were in the possession of the said *Caldwell*, they should find the defendant guilty.

The only question arising upon this record is whether the Court should have given the instructions asked, and whether the instructions given are erroneous?

There is no principle better settled than that, in all indictments for an injury done to the person or property of an individual, the christian and surname of the party injured must

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(a) *Winder v. The State*, 25 Ind., 234.

be stated, if the party injured be known. In indictments for larceny, if the party injured be not known, the indictment must state the property to be the goods and chattels of some person unknown; or if the indictment be for stealing the shroud of a dead person, it must state it to be the goods and chattels of the executor or administrator. But where [\*327] \*goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of the bailor or bailee, as, for instance, cattle in the possession of an agister, goods entrusted to a person for safe keeping or to carry, cloth in the hands of a tailor to make into clothes, goods pawned, goods let with ready furnished lodgings, and the like; in all such cases the goods and chattels may be laid to be the goods and chattels of either the true owner or the possessor, because the possession is distinct from the true ownership, and the person who thus has possession has a special property in the goods and chattels possessed, and may maintain an action for a trespass committed on them, in his own name. But if the goods and chattels are in the possession of a servant, or a married woman, they must be stated in the indictment to be the goods and chattels of the master, or the husband, the possession of the servant being the possession of the master, and the possession of the wife being the possession of the husband: neither the servant in the one case, nor the wife in the other, has any special property in the goods, and no action can be maintained in the name of either of them for a trespass committed on the goods.

And in the case of indictments for the stealing of goods and chattels from partners or joint owners, all the partners or joint owners must be correctly named, if known; if they are not known, or part only of them known, the indictment must allege them to be the goods and chattels of some persons unknown. The right of property in the goods and chattels vests in the whole of the partners, and not in one or more of them, and hence they must be all named. The possession of the goods and chattels by one of the partners does not authorize the goods to be charged as the goods of the individual partner who

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thus possesses them, because he does not stand upon the footing of a bailee. He can not maintain an action in his own name for a trespass committed upon, or an injury done to the goods and chattels, as a bailee can. His possession is the possession of the whole of the partners, and the doctrine of special property can not arise. The authorities to sustain this view of the law on the subject under consideration are numerous and satisfactory, and we think no doubt exists. As to the argument of inconvenience, we have nothing to do with it: we do not make law: our business is to declare what the law is. 2 Hawk. ch., 25; 2 Hale, 181; 1 Hale, 513; 1 Leach, 356, 463, [\*328] 464, n., 536; \*2 Leach, 875; 2 East, 652, 653, 654; *Rex v. Remnant*, Russ. & Ry., 136; *Rex v. Scott*, Russ. & Ry., 13; *Rex v. Belstead*, Russ. & Ry., 411; *Rex v. Brunswick*, Ry. & Moody, 26; *Rex v. Wilkinson*, Russ. & Ry., 480. Indictments for stealing the goods and chattels of partners and joint owners are now regulated in *England* by the statute, 7 Geo. 4. c., 64, s. 14, but that statute is not in force here, and we have no statute on the subject (1).

We think that the Circuit Court should have given the instructions asked, and that the instructions given are erroneous.

BLACKFORD, J., being indisposed, was absent.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*J. H. Thompson*, for the plaintiff.

*W. Herod*, for the State.

(1) "Formerly, where goods stolen were the property of partners, or joint owners, all the partners or joint owners must have been correctly named in the indictment; otherwise, the defendant would have been acquitted. But to avoid this difficulty the stat. 7 Geo. 4. c. 64, s. 14, provides that in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be." Arch. Cr. Pl., 13. As to whose property the goods stolen should be alleged in the indictment to be, in a great variety of cases, see Arch. Cr. Pl., 11-15, 128, 129; Roscoe's Ev. Cr. Cas., 512-520.

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Cox and Others v. Way, Commissioner.

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## COX and Others v. WAY, Commissioner.

CONTRACT—PLEADING.—To an action on a bond for the performance of certain work within a specified time, a plea that the plaintiff made another contract with one of the obligors, after the date of the bond, for the doing of the same work, and thereby prolonged the time for doing the same, and that such obligor did the work within the enlarged time to the plaintiff's satisfaction, is not a bar to the action.

ERROR to the *Randolph* Circuit Court.

STEVENS, J.—This cause was decided at the *November* term, 1832, of this Court, and both parties petitioned for a [\*329] rehearing. \*The petitions were taken under advisement and have not until now been disposed of. Neither of the petitions is granted. There is but one point in the case about which there was the least doubt, and that is as to the sufficiency of the defendants' second plea. The substance of the declaration is, that the defendants, *John D. Cox, Samuel Cox, James Bass, and George Hoffman*, on the 6th day of *September*, 1828, made their bond payable to the plaintiff for a certain sum of money, conditioned that they, the said defendants, should do certain work upon a certain State road within two months of the date of the bond; that they failed to do the work, and are therefore liable to him for the debt in the bond mentioned.

The defendants, by their second plea, admit the making of the bond and condition, and that they failed to perform the condition, and are therefore liable to pay to the plaintiff the said debt if satisfaction has not been made; but they say that satisfaction has been made, and therefore they are not liable: because they say that after the making of the bond and condition, the plaintiff made another contract with *George Hoffman*, one of the defendants, for the doing of the same work on the same road by him the said *George*, and by that second contract did prolong the time of doing the same until the first day of *February*, 1830; and that the said *George* did well and truly do the same by the time specified in his contract, to the satis-



faction of the plaintiff. This is the substance of the second plea, and it does not certainly contain a sufficiency of matter to bar the plaintiff's action.

To make the plea sufficient, it must appear that the new contract was made by and between the parties to the bond, and that the plaintiff and defendants agreed to it and sanctioned it, either in their own proper persons or by their agents. This, however, is not stated. The plea does not allege that these defendants, either in person or by agent, made this contract; nor does it allege that the said *George* was authorized by them to make such a contract, or that they ever agreed to or sanctioned any such contract; nor is it stated that the said *George* made it for them or for their benefit; nor is it stated that they would have complied with the condition of their bond, if this last contract had not been made. Again, to make this plea good, it should have been averred that the new contract made and the work done by the said *George*, were in satisfaction and \*discharge of the bond of these defendants, and that the plaintiff so understood it, and so accepted and received the work. No such averments, however, are to be found.

It has not, perhaps, been said, that such averments are not necessary, nor has it been said that such allegations are to be found in the plea, but it has been insisted that they may be inferred from what is stated; that a sufficiency is stated to authorize such an inference. Let this argument of inference be tested by two or three well settled and established rules of pleading. It is a general rule of pleading, to which there is no exception, that whenever the defendant acknowledges the plaintiff's cause of action, both as to the facts stated and the conclusion of law arising thereon, but seeks to avoid it by new facts which he sets up, he must state those facts clearly, positively, and distinctly, and in direct terms, and not leave them to be collected by inference. Again, it is also a general rule of pleading, to which there is no exception, that each special plea is taken most strongly against the party pleading it, and most favourably to his adversary. This rule is founded on two

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Cox and Others v. Way, Commissioner.

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presumptions: 1. That the party will always make his statement as favourably for himself as the truth of the case will possibly admit of, and therefore it would be doing injustice to the opposite party to infer that the truth of the case is more favourable for the party pleading it, than he has himself made it; and 2. The ambiguity, omission, or uncertainty in the plea, is the act of the party pleading it, and as it was in his power, and his only, to have stated his facts clearly, if any he had to state, he therefore must bear all the inconvenience that grows out of such defective pleading. Other rules of pleading might be noticed, all of which would show the insufficiency of the plea; but it is unnecessary: the plea as it stands is clearly defective; and we are not authorized to supply those defects by inference.

We are bound to believe that the defendants have presented the whole of the facts they have to present; and that those facts are stated in as favourable a manner for themselves as the truth would admit of.

*Per Curiam*.—The petitions for a rehearing are overruled.

*J. Rariden*, for the plaintiffs.

*J. Perry*, for the defendant.

END OF NOVEMBER TERM, 1833.

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1834, IN THE EIGHTEENTH  
YEAR OF THE STATE.

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 PELL *v.* FARQUAR, Administrator, in Error.

IF in a suit in chancery against *A*, *B* and *C*, there be a final decree against *A* alone, he can not assign for error that *B* and *C* had not legal notice of the suit.

If an administrator consent to the sale, by heirs, of the real estate of the intestate, he divests himself of any right, which he might otherwise have had under the statute, to make such estate assets, in case of a deficiency of the personal property.

If on a sale of real estate by heirs, the purchaser make a valid agreement, as a part of the consideration, to pay the debts of the ancestor should there be a deficiency of assets, the remedy against him on the agreement is at law and not in chancery.

The transcript of the record in a chancery suit, should contain all the evidence given in the Court below, in order that the Supreme Court may determine the merits of the cause (1).

(1) Vide note 1, to *Gallion v. M'Castlin*, Vol. 1 of these Rep., 95; 1 Ind., 101; 7 Id., 69; 9 Id., 481; 15 Id., 332.

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Allen v. Wheatley.

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[\*332]

\*ALLEN v. WHEATLEY.

**PLEADING—PRACTICE.**—Trespass against two persons for an assault and battery. One suffered judgment by default, against whom damages were assessed, and final judgment was rendered. Plea in bar by the other, issue to the country, and verdict and judgment against him. *Held*, that the taking separate judgments against the defendants, in such case, is error (a).

**RELEASE.**—The plaintiff in this case, on the trial of the issue, executed a release of the judgment against the other defendant, in order to render him a competent witness. *Held*, that the release discharged both the defendants (b).

ERROR to the *Morgan* Circuit Court.

STEVENS, J.—*Wheatley* declared against *Allen* and *Carpenter* jointly, in an action of trespass, assault and battery, false imprisonment, &c. *Allen* appeared and pleaded severally two pleas, on which issues were joined to the country. *Carpenter* made default, and an interlocutory judgment was entered against him, damages by an inquest assessed, and a separate judgment entered against him for the damages so assessed, and costs. Afterwards, at the same term, the issues joined between the plaintiff and *Allen*, the other defendant, were tried by a jury, *Allen* found guilty, separate damages assessed against him, and a separate judgment rendered against him thereon for those damages and costs.

It appears by a bill of exceptions, that on the trial of those issues, the plaintiff offered to introduce as a witness, to prove his cause of action, *Carpenter*, the other defendant, against whom final judgment had been rendered for damages and costs as aforesaid; and that *Allen*, the other defendant, objected on the ground of his being a joint trespasser, who was sued jointly as such, and who was a party to the record, and was interested. To obviate this objection, the plaintiff upon record entered a release of the judgment against him, and he was then sworn and gave evidence.

The errors complained of are: 1st, the action being joint

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(a) See *Johnson v. Valrick*, 14 Ind., 216.

(b) *Fitzgerald v. Smith*, 1 Ind. 310.



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for a joint trespass, the plaintiff erred in taking a final judgment separately against each defendant for separate damages and costs; 2d, that the separate final judgment taken against *Carpenter*, was in law a release to *Allen*; 3d, that the release on record of the judgment against *Carpenter*, discharged [\*333] \**Allen* from any further liability; and 4th, the Court erred in permitting *Carpenter*, the co-defendant, to give evidence on behalf of the plaintiff.

There is, perhaps, no subject in the books about which there appears to be so much contradiction and uncertainty as there is respecting the rights of the parties in actions for trespasses. The cases can not all be reconciled with each other, but still the true doctrine may, perhaps, in most cases be, with some degree of certainty, collected. All trespasses are joint or several at the will of the person to whom the wrong is done, and he may sue them jointly or separately at his will. The joint act of several trespassers forms but one injury, and that injury requires but one compensation, and each of the joint trespassers is liable for the whole wrong committed, and if the injured party receives satisfaction from one, it absolves all the others; also, an accord and satisfaction with one, or a release to one, discharges all the others.

The injured party may, if he choose, sue several joint trespassers separately, and may prosecute each suit to a final judgment, but there he must stop and elect against whom he will take his execution, and when he has made his election, he must enter a perpetual stay of execution as to each of the other judgments. He can not have two separate executions. Hence a final judgment and an execution, or an order for an execution against one of several joint trespassers, is a discharge of all the others. But if he bring a joint suit against them all, he can have but one final judgment. If they sever in their defense, and make separate issues to the country, and separate damages be assessed separately on each issue, yet he must not take separate judgments. In such case he must elect for which assessment of damages he will take judgment, and enter a *remittitur* as to all the other assessments, and take his final

## Allen v. Wheatley.

judgment against all the trespassers for the one damages, and all the costs; or he may enter a *nolle prosequi* as to all the defendants but one, and take judgment against him alone for the damages assessed against him, and costs. There may, however, be cases of trespasses committed upon land and the like where, if the trespassers are separately sued, or if they sever in their defense, the jury may find one guilty at one time, and another guilty at another time, and several damages may be assessed; or the jury may find some of them guilty [\*334] as to part, and others \*not guilty as to part, and assess the damages severally; but there can be no case of a tort committed upon the person where that can be done. Bac. Ab. Trespass; *Mitchell v. Milbank*, 6 T. R., 199; *Crane et al. v. Hummerstone*, Cro. Jac., 118; *Hill v. Goodchild*, 5 Burr., 2790; 11 Co., 5; *Strange*, 422; *Proprietors of the Kennebeck Purchase v. Boulton et al.*, 4 Mass., 419; *Riley v. M'Gee*, 1 Marsh., 432; *Rochester v. Anderson*, 1 Bibb, 439; *Dougherty v. Dorsey*, 4 Bibb, 207; *Livingston v. Bishop*, 1 Johns. Rep., 290; *Rose v. Oliver et al.*, 2 Johns. Rep., 365 (1).

In the case now before us the action was joint against two for a joint trespass by them committed upon the body of the plaintiff, and therefore he could only have one final judgment. He, however, thought proper to have damages assessed against each defendant separately, and took a final judgment separately against each accordingly. In that there is error.

And as to the release given by the plaintiff to *Carpenter*, one of the defendants, for the purpose of making him a competent witness against the other defendant, there can be but one opinion; it operates in law as a release to *Allen*, the other defendant, and absolves him from all further liability.

It is not necessary to examine the other errors; the case must be reversed.

*Per Curiam*.—The judgment is reversed, with costs.

*C. Fletcher*, for the plaintiff.

*W. W. Wick* and *H. Brown*, for the defendant.

(1) Vide *Palmer et al. v. Crosby*, Vol. 1 of these Rep., 139, and notes 4, 5, 6; *Davis v. Scott*, Ibid., 169.

## Kearns v. The State.

## KEARNS v. THE STATE.

**RECOGNIZANCE.**—If a penal bond, taken by the sheriff for the defendant's appearance to an indictment, show on its face that it was signed and sealed in the presence of the sheriff, and approved of by him, it is good as a recognizance, and the defect in its form, if any, is cured by the statute.

**ABBREVIATION.**—The writing of *Octb.* for *October*, in a *scire facias*, to designate the time for appearance to the writ, can not be assigned for error.

**RETURN—SERVICE.**—Two returns of “not found” to a *scire facias*, like two returns of *nihil*, are equivalent to service (a).

[\*335] **\*PRACTICE.**—The rendering of judgment for the amount of a recognizance, at the time of declaring the same forfeited, is mere surplusage, and can not be assigned for error.

ERROR to the *Hendricks* Circuit Court.

**BLACKFORD, J.**—*Kearns* was indicted at the *October* term of the *Hendricks* Circuit Court, 1831, for adultery, and process on the indictment was issued against him. An endorsement on the process required the sheriff to take bail, and to bind *Kearns* and his surety in the sum of \$100 each for *Kearns'* appearance, &c. The sheriff, upon serving the process, took from *Kearns* and his surety an obligation as follows:

“Know all men by these presents that we, *John Kearns* and *Thomas Samuel*, are held and firmly bound unto the State of *Indiana*, in the penal sum of \$100 each, for the true payment of which, well and truly to be made, we bind ourselves, our heirs, &c., as witness our hands and seals, this 22d day of *October*, 1831. The condition of the above obligation is such that, should the above bound *John Kearns* personally be and appear before the judges of the *Hendricks* Circuit Court, on the first day of their next *April* term, to be holden at *Danville*, then and there to answer unto the State of *Indiana*, on a certain charge exhibited against him for living in adultery, and to such other matters and things as may then and there be charged against him, and not depart thence without leave of said Court, then the above obligation to be void; otherwise, to remain in force. *John Kearns*, [L. S.] *Thomas Samuel*, [L. S.]

(a) *Walker v. Hood*, 5 Blackf., 266; 8 Id., 387.

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Signed and sealed in my presence, and by me approved. *Tho. Nichols*, Sheriff, H. C."

This obligation, together with the process, was returned to the Court on the first day of the *April* term, 1832, and *Kearns*, being then called, failed to appear, and *Samuel*, being called to bring *Kearns* into the Court, also made default. The Court thereupon ordered that the recognizance be forfeited; that the State recover of *Kearns* and *Samuel*, severally, the amount of the recognizance, and that several writs of *scire facias* issue against the recognizers, to show cause why execution should not issue against them for the amount of the said judgment.

In *September*, 1832, a *scire facias* issued, requiring the sheriff to summon *Kearns* to appear before the judges of the *Hendricks* Circuit Court, on the first day of their next *Octb.* term, to be holden at the Court House in *Danville*, on the third [336] Monday in \*said month, to show cause, &c. At the *October* term, 1832, this *scire facias* was returned *not found*. An *alias scire facias* was then issued, which was, afterwards, at the *April* term, 1833, also returned *not found*. On the return of the *alias scire facias*, *Kearns* being called and failing to answer, the Court awarded execution against him for \$100, which was the amount of the obligation, together with costs.

*Kearns*, the plaintiff in error, contends that the obligation executed by him for his appearance to the indictment is a penal bond, and not a recognizance, and that therefore an action of debt, and not a *scire facias*, was the remedy for its forfeiture. The provision of the statute under which this objection is taken is as follows: "It shall be the duty of the Circuit Court to make an order, fixing the amounts in which each person indicted shall be held to bail, and the clerks, upon issuing process against such person, shall endorse upon the process a memorandum of the said amount of bail required, and the sheriff, in taking security for the appearance of such indicted person, shall govern himself accordingly, and recognizances for the appearance of any person accused of offenses, taken and acknowledged before a proper officer, shall not be void for the



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want of form." R. C., 1831, p. 197. A recognizance is not usually signed or sealed by the cognizor. It is witnessed by the record of the court in which it is taken, or to which it is returned by the officer who takes it. It is an obligation of record, entered into before some court of record, or before some officer duly authorized, with a condition to do some particular act. 2 Bl. Comm., 341. The obligation before us is in a certain penal sum, conditioned for *Kearns'* appearance at Court. The only objection against its being a recognizance is that it is signed and sealed by the party. We do not conceive that the signature and seal can, of themselves, prevent this instrument from being considered a recognizance. To determine its character, we have only to inquire whether it has been duly acknowledged before the proper officer. The sheriff, who was authorized to take the recognizance, certifies, on the face of the obligation, that it was signed and sealed in his presence, and approved of by him. This certificate settles the question. The obligation was duly acknowledged before the proper officer, and it can not be a substantial objection to its character as a recognizance that the acknowledgment was [\*337] \*made under the hand and seal of the party, instead of being only verbally made. The instrument is, in substance, a valid recognizance. If there be any defect in its form, that is cured by the statute under which it was taken.

It is also contended, that the *scire facias* states no time for the defendant's appearance to show cause. The sheriff is commanded, by the writ, to summon the defendant "to appear before the judges on the first day of their next *Octb.* term, to be holden on the third *Monday* in said month." It is said that *Octb.* expresses no particular month. This objection is too slight. The abbreviated word could not be mistaken. But strike it out and also the words "in said month," and the writ then requires the defendant's appearance at Court "on the first day of their next term," which is sufficiently explicit.

It is further objected, that two returns of "not found" to a *scire facias* do not authorize the State to proceed as if the writ had been served. According to our statute, if the sheriff can

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not find the defendant, he may return the *scire facias* "not found." R. C. 1831, p. 412. The return of "not found," therefore, is similar to that of *nihil*, and as, according to the books of practice, two returns of *nihil* are equivalent to a service, so must also, under the statute, be two returns of "not found." There is, besides, in the act relative to justices of the peace, an express provision that two returns of *nihil* or of "not found," shall be deemed equivalent to a service of the *scire facias*. It is probable, from the general mode of expression, that this provision was intended to be general, and not to be confined to writs of *scire facias* in the particular case mentioned in the section in which the provision is inserted. Rev. Code, 1831, p. 309.

The last objection of the plaintiff in error is, that the Court erred when, after declaring the recognizance forfeited, they gave judgment that the State should recover the amount mentioned in the recognizance. This objection is only as to a matter of form. The judgment rendered in this case is nothing more than what is implied by the declaration of forfeiture. It is for the amount of the recognizance which was already declared forfeited, and may be considered merely as surplusage. A part of this judgment as it stands, is, that a *scire facias* should issue against the defendant, to show cause why execution should not issue for the amount; which is the [\*338] \*same proceeding that would have taken place had the judgment complained of not been rendered. There is nothing in the objection.

*Per Curiam*.—The judgment is affirmed with costs.

W. W. Wick, for the plaintiff.

W. Herod, for the State.

## Morrow v. Seaman.

## MORROW v. SEAMAN.

**PROMISSORY NOTE—PARTIES.**—A note was given to a private association, for a debt due them, as follows: "I acknowledge myself indebted to the trustees of the *Springborough* school society in the sum of twenty-eight dollars and eighty-nine cents, which I promise to pay unto *A B*, treasurer of said society," &c. *Held*, that a suit would not lie, on this note, in the name of the treasurer (*a*).

**ERROR** to the *Rush* Circuit Court. *Seaman* was the plaintiff below, and obtained a judgment.

**STEVENS, J.**—The facts of this case are these: In the year 1821, and before that time, there existed an association of individuals, who had associated themselves together for the promotion of common school education, under the name of the "trustees of the *Springborough* school society;" and they had a treasurer by the name of *Jacomiah Seaman*. The society owned and possessed a school house which they rented to *John Morrow*, the plaintiff in error; and on the 15th day of *December*, 1831, he was in arrears for the rent to the society, in the sum of twenty-eight dollars and eighty-nine cents, and for the payment of which he gave a promissory note in these words: "I acknowledge myself indebted to the 'trustees of the *Springborough* school society,' in the sum of twenty-eight dollars and eighty-nine cents, which I promise to pay unto *Jacomiah Seaman*, treasurer for said society," &c. After giving this note to *Seaman*, and long before any suit was brought on it, the society dissolved itself, and this note was delivered up to the members of the association as part of their effects, by *Seaman*, he having no beneficial interest therein, and the office of treasurer to the society having ceased to exist. After which, the suit under consideration was brought in the name of the said *Jacomiah Seaman*.

[\*339] \*The question raised for the consideration of the Court is, whether an action will lie on the above

(a) See *Upton v. Starr*, 3 Ind., 508, and cases there cited. See 5 Ind., 69.

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described promissory note and state of facts, in the name of *Jacomiah Seaman*?

The only true rule by which it can in all cases be determined who should be the plaintiff, in actions founded upon contract, is, to ascertain with whom the contract has been made, or, in other words, who has the legal interest in the contract; for he alone can complain that it has been broken and can enforce its performance; and this inquiry is governed by the nature and true intent and meaning of the agreement itself. In the case now under consideration there is no doubt or difficulty whatever; the contract was not made with *Jacomiah Seaman*, nor was *Morrow*, the obligor in the contract, indebted to *Seaman*. He was indebted to those persons known by the artificial name of the "trustees of the *Springborough* school society," and with them he contracted, and to them he promised to pay, and in them the legal interest exists. No consideration whatever passed from *Seaman* to *Morrow*, nor had *Seaman* any beneficial interest in the transaction; he was a mere agent of the association, and as such, simply used as a convenient medium through which this money might pass into their hands, and he at no time could have maintained an action in his own name against *Morrow* on that contract.

This suit, however, was not brought until after *Seaman* ceased to be such agent, and consequently after he ceased to be the medium through which the money might pass. So soon as he ceased to be treasurer, his authority to receive the money ceased, and if *Morrow* had paid it to him after that, the payment would not have been available.

The cases of *Pigott v. Thompson*, 3 Bos. & Pull, 147, *Harper v. Ragan*, 2 Blackf., 39, and *Gunn v. Cantine*, 10 Johns. R., 387, are directly in point, and satisfactorily settle the question raised in this case.

*Per Curiam*—The judgment is reversed, with costs.

*O. H. Smith*, for the plaintiff.

*J. Perry*, for the defendant.



## Hollingsworth v. Bates.

[\*340]

\*HOLLINGSWORTH v. BATES.

**SALE—DELIVERY.**—*A* being indebted to *B* in the sum of seventy-two dollars, agreed to sell him a horse for forty-five dollars, or such sum as *C* should determine; and the horse was accordingly delivered to *B*, but *C* refused to fix the price. *B* kept the horse three days, and offered him for sale, when he was levied on by virtue of an execution against *A*. *Held*, that the horse was not subject to the execution, the previous sale of him to *B* at forty-five dollars being complete.

ERROR to the *Union Circuit Court*.

**M'KINNEY J.**—This is an action of trespass brought by *Hollingsworth* against *James Bates* and *Nathaniel Brown*, to recover the value of a horse.

To the declaration the defendants pleaded—1. The general issue; 2. That before the time in the declaration mentioned, when, &c., on, &c., *William Brown*, administrator of, &c., recovered a judgment against *Isaac Jones*, in debt, before a justice of the peace of *Union County*, for the sum of seventy-five dollars and seventy-five cents, with interest, &c., on which judgment *James Bates*, on, &c., entered himself replevin-bail; that on, &c., the justice of the peace issued a writ of *fi. fa.* on said judgment, directed to the defendant, *Brown*, a constable, &c.; that he returned it endorsed “no property found to levy on;” that judgment on *sci. fa.* was rendered against *Bates*, the replevin-bail, who paid the judgment; that on, &c., before the time when, &c., *Bates* caused an execution of *fi. fa.* to be issued on the judgment against *Jones*, for his use; that this execution was also placed in the hands of the defendant, *Brown*, constable, &c.; that he afterwards and before the return day, on, &c., seized and took in execution as the property of *Jones*, the horse in the declaration mentioned; and that this is the same trespass complained of, &c.

*Brown* having died, his death is suggested on the record. The plaintiff in his replication to the second plea says, that the property levied on by the officer was not the property of *Jones*, but was the property of the plaintiff. The issues were tried

by a jury, and a verdict found for the defendant. A motion for a new trial was made and overruled, and judgment rendered on the verdict.

[\*341] \*Three errors are assigned: 1. The rejection of *Jones* as a witness; 2. The refusal to charge the jury as requested by the plaintiff, and in giving a charge contrary to law; 3. The refusal to set aside the verdict.

The testimony upon which the instructions were predicated, is made a part of the record. It seems that the horse in controversy was levied on by virtue of a *fi. fa.* as the property of *Isaac Jones*; that the plaintiff purchased the horse of *Jones* at forty-five dollars, or such price as *James Bates* should say the horse was worth, in part payment of a note for seventy-two dollars, which the plaintiff held on *Jones*; that the plaintiff and *Jones* called on *Bates*, who refused to fix the value of the horse, and that on such refusal the plaintiff concluded to take the horse at forty-five dollars, had accordingly taken him home, and had offered to sell him; that the plaintiff's object in having the horse valued by *Bates* was, that he might get him at forty dollars; that the plaintiff bought the horse on the 13th day of *November*, 1830, and had him in possession three days before he was levied upon; that the levy was made on the 15th day of *November*, 1830, the day the execution in favour of *Bates* issued; that no credit was endorsed on the note held by the plaintiff against *Jones*, but that he had sent it to *Cincinnati* to *Jones*, after the sale of the horse by the constable, with a view to a compromise with *Jones*.

The instructions asked and refused are the following: First, That if it was proved that the plaintiff held a note against *Jones* for seventy-two dollars, at the time of getting the horse into his possession, and if *Jones* had agreed to sell the horse to the plaintiff at the sum of forty-five dollars, or such sum as *Bates* would place on him, and then delivered the horse to the plaintiff, who took him home and kept him three days after the refusal of *Bates* to name the price, the sale was good, the title vested in the plaintiff, and the jury should find for him. Secondly, That if *Jones* delivered the horse to the plaintiff in

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part payment of said note, the sale was a good one, although nothing was said concerning the price of the horse. These instructions were refused; but the court charged the jury, that if *Jones* sold the horse to the plaintiff in part payment of said note, at the sum of forty-five dollars, or such sum as *Bates* should name, and *Bates* refused to fix the price, the sale would be imperfect, although the horse was delivered to the plaintiff, and kept by him until he was taken in execution by [\*342] *Bates*, and the title to the horse would not vest in \*the plaintiff; but if the jury believed that the plaintiff and *Jones* afterwards agreed upon the value of the horse, the sale would be good.

Proceeding in the order in which the errors are assigned, we will first notice the rejection of *Jones* as a witness. It is merely stated in the bill of exceptions that *Jones* was offered by the plaintiff as a witness, and rejected by the court. If *Isaac Jones*, the vendor of the horse and the defendant in the execution, was intended, and the ground of his rejection, as in argument urged, was interest, a question would be presented not without importance. We are, however, confined to the record, and as it does not distinguish the witness and show the reason of his rejection, the presumption must be indulged that the Circuit Court was correct.

In determining whether there was error in refusing the instructions asked by the plaintiff, and charging the jury as was done, the first question to be settled is, To whom, provided the testimony before us was believed by the jury, did the horse belong—to *Isaac Jones*, the execution defendant, or to the plaintiff in this suit? *Jones*, three days before an execution issues against him for the use of *Bates*, sells to *Hollingsworth* a horse at forty-five dollars, or for such price as *Bates* shall fix. Here we will inquire, For whose benefit was the reference to be had to *Bates*? Exclusive of positive testimony that it was for *Hollingsworth's*, that conclusion, without confirmatory acts, must be deduced from the nature of the contract. If thus deducible from the contract, the sale to the plaintiff was perfect, being accompanied by an essential ingredient to its validity,

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delivery. The parties stood in a different relation to each other. The sum of forty-five dollars of the amount due on the note was discharged, and the plaintiff in the enjoyment of the possession of, and right of *Jones* to the horse.

Contracts are expressed or implied, and either are equally available in law. The former, such as we consider that under examination to be, are created by the parties themselves. If such contract oppose no salutary provision, or be not in conflict with any principle of the common law, interposed for the prevention of detriment to the community by example or otherwise, it will be construed agreeably to the intention of the parties, derived either from acts or language, and enforced. Treating the present contract as entirely legitimate, and adopting the rule of construction noticed, intention of the

[\*343] parties, it is apparent that \*the sale was perfect, from the fact that the plaintiff, after *Bates'* refusal to value the horse, without opposition from *Jones*, took the horse home with him, treated it as his property, offered it for sale, and retained it three days before it was levied on. No claim is made by *Jones*, no right asserted by him, none could have been, consistently with the contract. If it were necessary to consider this as an implied contract, founded on the delivery by *Jones* to the plaintiff of the horse, and the plaintiff's subsequent acts of ownership, we should arrive at the same conclusion—that *Jones* had parted with his interest in the property to the plaintiff, and was, by operation of law, entitled to its value. It is unnecessary, when this position is established, to deduce by reasoning a legal consequence, the exemption of the property in controversy from the execution. It is urged, however, that this sale was fraudulent. To this we answer, that if it were, it is not shown by the testimony. The reference to *Bates*, a judgment creditor of *Jones*, and the whole transaction as disclosed, strongly repel the idea of its existence.

It seems admitted that the plaintiff has not entered a credit on the note held against *Jones*, for the price of the horse; and that since the sale of the horse on execution, he has sent the note to *Cincinnati* to *Jones*, with a view to a compromise.



This does not alter or affect the contract. Although the credit be not endorsed, the whole amount of the note can not be collected, as forty-five dollars of it have been paid. This is a question, however, for *Jones* and *Hollingsworth*. It is for them to settle it.

From this view of the case, it is obvious that the Circuit Court erred in refusing to give the instructions asked by the plaintiff, as well as in the charge it gave, and in not having granted a new trial.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*J. Perry*, for the plaintiff.

*O. H. Smith*, for the defendant.

[\*344]

\*LANG v. THE STATE.

SCIRE FACIAS—RECOGNIZANCE.—A *scire facias* on a recognizance taken out of Court, must show that the recognizance was taken by a person legally authorized to take it; that it was duly acknowledged before him; and that it was filed and recorded in the proper Court (*a*).

ERROR to the *Morgan* Circuit Court.

STEVENS J.—On the 23d day of *October*, 1832, a writ of *sci. fa.* issued out of the office of the Clerk of the Circuit Court of the county of *Morgan*, summoning *Lang*, the plaintiff in error, to show cause, if any he could show, why the State of *Indiana* should not have execution against him for the amount of a certain recognizance, &c. The *sci. fa.* alleges that the Hon. *Hiram Matthews*, one of the associate judges of said court, did, on a certain day, file in said clerk's office a certain recognizance, which is set forth *in hæc verba*; and that afterwards, at a certain term of said court, *Lang* was called and defaulted, the recognizance made absolute, and the writ

(a) *Davis v. The State*, 5 Blackf., 374.

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of *sci fa.* awarded. This is in substance all that the *sci. fa.* contains. To this writ an issue in law was made upon a general demurrer, and the demurrer was overruled, and judgment rendered in favour of the State that she have execution, &c.

Several exceptions are taken to the judgment, record and proceedings. First, It is said that the recognizance is insufficient, upon its face, to authorize the proceedings had, in consequence of the uncertainty as it respects the time when the recognizers were bound to appear and answer. This objection we think is not well taken; the recognizance as to that is sufficiently certain to authorize the proceedings, if it is in every other particular regular, legal and valid.

The next objection is a very general one, and applies to the whole record and proceedings. This Court has said, in the case of *Andress v. The State* (1), that a *sci. fa.*, though a judicial writ, must be considered as an original action, to which the defendant may plead; that it must contain a legal cause of action; that it must show a sufficiency on its face to authorize the judgment asked for. This decision of the Court is well

sustained by reason, justice, and the authorities, and [\*345] will not \*be departed from. The *sci. fa.* in this case is founded upon a recognizance not taken by a court of record; and a recognizance not taken by a court of record, is not strictly a record until it is filed and entered in a court of record by the proper authorities; and even not then, unless it is taken by a person legally authorized. Hence, every *sci. fa.* founded on such a recognizance should show, by proper averments, that the person taking it was legally authorized so to do, and that he filed it in the proper court of record to be recorded, and that it was so recorded, and thereby became a part of the records of said court, and still so remains, &c. 2 Marsh, 132; 2 Evans' Harris, 470. The *sci. fa.* in these and other particulars is wholly defective. It is nowhere shown that the recognizance was taken by a person legally authorized; nor is it alleged that it was taken by any person. The only

## Lang v. The State.

statement in relation to that is this, that on a certain day his honor, *Hiram Matthews*, filed a recognizance in these words, &c.; but it is not stated by whom it was taken, nor is it stated when or where it was taken. But even if it did show that it was taken by his honor, *Hiram Matthews*, still it does not show that he was authorized. An associate judge can only act in his proper county, therefore it is material in a case like this, to show that the recognizance was taken in the proper county; in this case, however, that is not shown. Again, it is not averred that the recognizers ever appeared before any person and acknowledged the recognizance; the only statement on that point is, that the recognizance is signed by *Elijah Lang*, &c.; but there is no averment that it was made and acknowledged, &c., by him, nor is there any statement that can be construed to amount to that averment.

There are many other defects in the record, but it would be a useless waste of time to notice them all specially. The whole record taken together is certainly without precedent; it neither contains the form nor the substance of a record of the Circuit Court. It is simply a copy of various papers and minutes of the order book, without either a *placita* or parties; in which there is not, substantially and directly, a single fact stated. A record should be a legal, logical and succinct statement of facts, and not a literal copy of the papers, minutes, and evidence, by which the facts might be proved. The transcript presented to us is not even certified, as is required by statute. The statute requires that the clerks of the [\*346] Circuit Courts shall \*certify that the transcripts sent up to this Court are full and complete transcripts of the record, &c.; the certificate on this transcript is, that it is a copy of the proceedings had, &c.

In disposing of the objections raised to this record, we have not looked behind the writ of *sci. fa.*; all the proceedings up to the time of issuing that writ may be regular, correct and legal, on which available proceedings may be had, and, therefore, we give no opinion respecting them.

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The State v. Merrill.

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*Per Curiam.*—The judgment is reversed, and the cause remanded, &c.

*P. Sweetser*, for the plaintiff.

*W. Herod*, for the State.

(1) *Ante*, p. 108.

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### THE STATE v. MERRILL.

**INDICTMENT—MALICIOUS TRESPASS.**—An indictment for a malicious trespass need not state the means used to effect the injury.

ERROR to the *Rush* Circuit Court.

BLACKFORD, J.—This was an indictment against *Merrill* for a malicious trespass. The Circuit Court, on motion of the defendant, quashed the indictment.

The indictment states that the jurors, &c., “upon their oath present, that *Richard Merrill*, late of said county, on the 10th day of *July*, in the year 1832, with force and arms, at the county aforesaid, one cow of the value of twelve dollars, of the personal property of one *Jacob Trees*, of said county, then and there did maliciously and unlawfully injure, maim and wound, to the great damage of him the said *Jacob Trees*, to wit, the damage of six dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said State of *Indiana*.”

The objections made to this indictment are, that it does not state the means used by the defendant in doing the injury; nor does it show how much the value of the cow was lessened by the injury.

The statute on the subject is as follows: “That [\*347] every person \*who shall maliciously or mischievously, destroy or injure, or cause to be destroyed or injured, any property of another, or any public property, shall be deemed guilty of malicious trespass, and, upon conviction, shall



## Tyler and Others v. Denson, in Error.

be fined in any sum not exceeding two-fold the value of the property destroyed, or of the damage done, and be imprisoned,' &c. Rev. Code, 1831, p. 187.

We can see no ground for the objections made to the indictment in this case. The offense is sufficiently described to bring it within the statute, and to enable the Court to render a judgment. The species of property injured, its value, its ownership, and the damage to the owner, are stated; and the injury is averred to have been done maliciously. The motion to quash the indictment should have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. Herod*, for the State.

*O. H. Smith*, for the defendant.

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 TYLER and Others v. DENSON, in Error.

IF in the Circuit Court, on an appeal from the judgment of a justice, the defendant file additional pleas without objection, the plaintiff can not assign the filing of those pleas for error (1).

Under the statute of 1824, if money was lent at a higher rate of interest than six *per cent. per annum*, no interest at all could be recovered; and if, in such case, the usurious interest or a part of it had been paid, such payment was deducted from the principal, and the lender recovered the balance, without any calculation of interest (2).

(1) Vide Stat. 1833, p. 112; Stat. 1836, p. 62; Note (2) to *Nelson v. Zink*, ante, p. 101; *Bastion v. Dalrymple*, post, 365; Id., 402.

(2) For the present law respecting the legal rate of interest, and the penalty for receiving more than the law allows, vide Stat. 1833, p. 43; Note (1) to *Harvey v. Crawford*, Vol. 2 of these Rep., 43.

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[\*348]

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**PRESPASS—PLEADING.**—A defendant in replevin pleaded, that at the time when, &c., he was a constable, &c.; that two executions dated on, &c., and issued by a justice of the peace, were directed to him as constable, &c.; that he levied these executions on the goods of A, which were the goods mentioned in the declaration, and were not the goods of the plaintiff; that the goods were taken to satisfy the said executions; that this is the trespass complained of; and that without this he is not guilty. *Held*, that this plea, in not sufficiently describing the writs, and not stating that the plaintiff was the execution-defendant, is not a good plea in justification. *Held*, also, that the words in the plea—"without this that the defendant is not guilty"—neither constitute a special traverse, nor a distinct substantial defense. *Held*, also, that as a plea of property in a stranger, the plea is good, and that the other averments in it may be considered as surplusage (a).

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—*Robert Huston* brought an action of replevin against *James Parsley*. The declaration contains two counts. The first count charges the defendant with tortiously taking certain goods belonging to the plaintiff, and unjustly and unlawfully detaining them. The second count charges that the defendant lawfully acquired certain other goods belonging to the plaintiff, and unjustly and unlawfully detained them. Damage, \$200.

*Parsley*, the defendant, pleaded three pleas: First, That he did not take nor detain the goods as charged in the first count. Secondly, That he did not detain the goods as charged in the second count. The third is a special plea in bar. It states that at the time when, &c., the defendant was a constable of the township, &c.; that two executions dated on, &c., and issued by a justice of the peace, were directed to the defendant as constable, &c.; that the defendant levied these executions on the goods of one *George Long*, which were the same goods mentioned in the declaration, and were not the goods of the plaintiff; that the defendant took the said goods of the said *Long* to satisfy the said executions; that this is the trespass

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(a) *Hall v. Henline*, 9 Ind., 256.

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Parsley v. Huston.

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complained of; and that without this he is not guilty. And this he is ready to verify; wherefore he prays judgment.

To the third plea *Huston*, the plaintiff, demurred, and assigned as causes of demurrer, first, that the executions [\*349] are not \*sufficiently described; secondly, that the constable's return is not stated; thirdly, that the plea is double, in justifying and denying the matters complained of. This demurrer to the third plea was sustained by the Circuit Court. On the first and second pleas, issues were joined; and, upon these issues, a verdict and judgment were rendered for *Huston*, the plaintiff below.

*Parsley* brings the case, by writ of error, to this Court, and assigns for error, *inter alia*, that the demurrer to his third plea was erroneously sustained.

The principal object of this third plea is to show, that the defendant, as a constable, took and detained the goods by virtue of two executions against a third person. The plea, as a justification by authority of law, is liable to the objection first assigned as a cause of demurrer. It does not state the nature of the executions. We do not know whether they were writs of *feri facias*, or of *capias ad satisfaciendum*. We can not tell whether the sheriff acted in obedience to them or not, because the plea does not state what they commanded him to do. The plea is also fatally defective, as a justification by authority of law, in not showing that *Huston*, the plaintiff in replevin, was the execution-defendant. The circumstance, that goods have been taken in execution, and are thus in the custody of the law, is no bar to an action of replevin, unless the suit be brought by the execution-defendant. If *Parsley*, as constable, with a *fi. fa.* against *Long*, took the goods of *Huston*, the latter may maintain replevin. The statute gives the action to any person whose goods have been unlawfully taken or detained, excepting the execution-defendant. R. C., 1831, p. 424; *Chinn v. Russell*, May term, 1828.

But this plea, independently of what is evidently its main object, states expressly that the goods, for the taking or detaining of which the action is brought, were the property of *Long*,

a stranger, and were not the property of *Huston*, the plaintiff in replevin. This statement, if true, is a bar to the action. If *Huston* had no general or special property in the goods, at the time they were taken or detained, he can not maintain an action of replevin for the taking or detaining of them. 2 Selwyn's N. P., 364. To this part of the plea, only one of the causes of demurrer assigned is applicable. This cause is, that the plea is double, containing both a justification and [\*350] a denial of the \*injury complained of. To sustain this objection, it must appear that the plea contains two distinct defenses, each of which is, in substance, a good bar to the action. Steph. on Pl., 272, 273. They must be such defenses, too, as are mentioned in the cause of demurrer assigned. That the plea contains one good defense, in substance, to wit, that of property in a stranger, we have no doubt, but we do not find in it any other distinct substantial defense.

The words relied on to show that it contains another defense, are at the conclusion of the plea. They are these: "And *without this* the defendant is not guilty." These words were probably intended by the pleader for a special traverse, but they are very far from being that. In a plea, the special traverse, or, as it is often called, a traverse with an *absque hoc*, is a direct denial of the allegations in the declaration, which are only indirectly denied by the affirmative matter previously set out in the plea. A defendant, for example, pleads that his co-defendant is dead, and the plaintiff replies that he is alive. The replication must not stop there, because it contains, as yet, no direct denial of the co-defendant's death. It must go on further and say, *without this* that he is dead, or use other words in denial, as, that he is not dead. So, a defendant in replevin pleads that the goods were the property of a stranger; *without this*, that they are the property of the plaintiff. This is sufficient, and amounts to the same thing as saying that the goods were the property of a stranger, and not the property of the plaintiff. But to say, as the plea before us does, that the goods were the property of a stranger, *without this* that the defendant



is not guilty, is not a direct denial of the plaintiff's property in the goods, and were there no other expressions in the plea on the subject, it would be objectionable as being argumentative. The phrase, "*without this* that the defendant is not guilty," is no denial of the plaintiff's property in the goods, nor indeed is it a denial of anything. There happens, however, to be an averment in the plea that the goods were *not* the property of the plaintiff. This is a direct denial, and supplies the place of a special traverse with the *absque hoc*. Steph. on Pl., 188; Gould on Pl., 377.

But though the words referred to, to wit, "*without this* that the defendant is not guilty," are as far from being a special traverse as any other expressions possibly can be, yet, [\*351] at the \*same time, they are not liable to the objection relied on by the plaintiff below. They certainly do not contain, as he contends, a distinct substantial defense to the action. They are as far from constituting a distinct defense as they are from being a special traverse. They are no denial of the truth of the declaration, and no issue could be formed on them by which the cause could be determined. The plea is not, therefore, in consequence of these unmeaning words, subject to a demurrer for duplicity. Those words, like all the expressions in the plea relative to the executions, must be considered as mere matters of surplusage.

The averments in the plea that the goods, for the taking or detaining of which the action was brought, were the property of *Long*, and were not the property of *Huston*, the plaintiff, constitute a good defense to the action. If the plea be informal, there is no cause of demurrer assigned which can reach the informality. The demurrer to this plea should have been overruled.

Some objections were made by *Parsley* to the affidavit made by *Huston* before the writ of replevin issued, but the affidavit is not made a part of the record, and the objections to it are not therefore before us. The judgment must be reversed, because the demurrer to the third plea, as has been already observed, was erroneously sustained.

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The State, on the relation of Dunham, v. Hood and Another.

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*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*J. B. Ray* and *J. Eccles*, for the plaintiff.

*W. W. Wick*, *H. Brown*, and *J. H. Scott*, for the defendant.

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### THE STATE, on the relation of DUNHAM, v. HOOD and Another.

JUDGMENT—COSTS—AMENDMENT.—In an action in the name of the State on the relation of *A*, against *B* and *C*, the judgment was as follows: “It is, therefore, considered by the Court, that the said defendants go hence without day, and that *he* also recover his costs and charges in this behalf expended, and the plaintiff in mercy,” &c. *Held*, that under the statute, the judgment should have been against the relator for costs, and in favour of both the defendants, but that the mistakes as to these matters were merely clerical, and might have been amended at any time.

[\*352] \*ERROR to the *Allen* Circuit Court.

STEVENS, J.—The State of *Indiana*, on the relation of *Joseph Dunham*, brought suit in the *Allen* Circuit Court against *William N. Hood*, a justice of the peace, and *Samuel Hanna*, his surety, on the official bond of *Hood*, for the malfeasance and misfeasance in office of the said *Hood*, by which he, the said *Dunham*, said he had sustained an injury, &c. The case was tried by a jury, and a verdict rendered in favour of the defendants. Final judgment was then rendered in these words: “It is therefore considered by the Court that the said defendants go hence without day, and that *he* also recover his costs and charges in this behalf expended, and the plaintiff in mercy,” &c.

To reverse this judgment, two errors are assigned: 1. That the plaintiff was and is a sovereign and independent State, and therefore not liable to pay costs, &c.; 2. That the judgment does not follow the verdict, the verdict being in favour of both the defendants, and the judgment only for one defendant.

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The State, on the relation of Dunham, v. Hood and Another.

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Upon general principles, unaided and unaffected by statutory enactments, where a suit is brought on a private bond, for the use of an individual, the individual for whose use it is entered is not the legal plaintiff, the use only being entered for the protection of his equitable interest, and if he dies pending the suit, his death will not abate the suit, nor is there, for the purpose of the suit, any necessity for the suggesting his death, but the suit progresses as if he were still living, or as if the use had never been entered. The judgment is entered in the name of the nominal, that is, the legal plaintiff, and it is nothing to the defendant who may be entitled to the equitable interest. And just so in the case of a bond to the State, as in the present case, where it is for public use, and any injured person may bring a suit upon it, the State is the legal plaintiff, and there is no necessity, for the purposes of the suit, to enter for whose use it is brought; the judgment is entered in the name of the State, the legal plaintiff. *The State v. Dorsey et al.*, 3 Gill & Johns., 75, 93; *Fridge v. The State, use of Kirk*, 3 Gill & Johns., 103.

And it may be further remarked that, upon general principles, without the aid of legislative sanction, a sovereign State can not be amerced for costs. This case, however, does not stand on the general doctrine upon that subject; the legislature has removed all the difficulties as to that, and marked out the proper course to be pursued. By the 14th section of [\*353] the practice act of 1831, p. 402, it is enacted that "when suit is brought on any bond given by any executor or administrator, or any State, county or township officer, to and in the name of the State of *Indiana*, &c., for the performance of any duty or trust, it shall be the duty of the person for whose benefit the same was instituted to endorse on the writ or other process for whose benefit the same was issued, and if he fails to succeed in the suit, he shall be liable for all costs," &c. This statute settles the question now before us. The relator, *Joseph Dunham*, is liable for the costs of the suit, and judgment should have been entered against him accordingly. This, we presume, the Court intended to do, though

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by a misprision or mistake of the clerk, it is not done. The errors complained of are mere clerical inaccuracies, and might have been, at any time, amended, on a proper application to the Court below for that purpose; but it seems that no such application has been made. The judgment, as it stands, is not correct, and must be reversed, but without costs or prejudice.

*Per Curiam*.—The judgment is reversed, and the cause remanded, &c.

*H. Cooper*, for the State.

*D. Wallace*, for the defendants.

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### SINARD v. PATTERSON.

**ASSUMPSIT—PLEADING.**—A plea to an action of assumpsit, that the defendant had paid the plaintiff the several sums in the declaration mentioned, with all interest due thereon, according to the form and effect of the promises in the declaration mentioned, in goods, wares, and merchandise, and money, can not be supported either as a plea of accord and satisfaction, or of payment, or of set-off under the statute (a).

**SAME.**—A plea to such an action, that the contract between the parties, if any was made, was under seal, may be objected to on motion, or by special demurrer.

**SEALED AGREEMENT.**—An agreement under seal can not be rescinded by a parol contract.

**SAME—NOT TO BE VARIED BY PAROL CONTRACT.**—The terms of a sealed agreement can not be varied by a subsequent parol contract, so as to authorize a suit on the sealed agreement, which suit, without the parol contract, could not be sustained; and, consequently, the existence of the sealed agreement, in such a case, is no bar to a suit on the parol contract (b).

**INSTRUCTIONS TO JURY.**—Erroneous instructions to the jury can not be assigned for error, if they were not applicable to the case, and could not injure the party complaining of them (c).

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(a) This case is overruled by *Louden v. Birt*, 4 Ind., 566. There the Court says: "Payment may be made in anything the creditor will accept as payment. And under the general issue, or a general plea of payment, payment in anything that has been accepted or received as payment, may be proved."

(b) See *Lomax v. Bailey*, 7 Blackf., 599, and cases there cited.

(c) *Harrie v. Barnett*, 4 Blackf., 369.



## Sinard v. Patterson.

[\*354] \*APPEAL from the *Marion* Circuit Court.

BLACKFORD, J.—This was an action of *assumpsit*, brought by *Patterson* against *Sinard*. The declaration contains several counts. The first count is on a special contract respecting the sale and delivery of bricks. The other counts are general ones for bricks sold and delivered.

The defendant pleaded three pleas. First, non-*assumpsit*. Secondly, *actio non*; for that on, &c., at, &c., before the commencement of the suit, the defendant paid to the plaintiff the several sums in the declaration mentioned, together with all interest due thereon, according to the form and effect of the several promises and undertakings in the declaration mentioned, in goods, wares, and merchandize, and money; and this the defendant is ready to verify. Third plea, *actio non*: the defendant says, that if any of the bricks were made for and delivered to him by the plaintiff, they were made and delivered in part performance of a covenant under the hands and seals of the parties, &c.; that no bricks were sold and delivered by the plaintiff to the defendant on any account, but on the said contract under seal.

On the plea of non-*assumpsit*, issue was joined. To the second plea, the plaintiff demurred specially; assigning for causes of demurrer, first, that the plea amounts to the general issue; secondly, that the plea concludes with a verification. This demurrer the Court sustained. The third plea was set aside on the motion of the plaintiff. The issue on the plea of non-*assumpsit* was tried, and a verdict returned in favour of the plaintiff for \$300. The defendant moved for a new trial, but his motion was overruled, and a judgment was rendered against him on the verdict. The defendant appeals to this Court.

The first point relied upon by the appellant is, that the demurrer to his second plea should not have been sustained. The causes of demurrer assigned are insufficient. The plea contains no denial of the truth of the declaration. It denies, like all other pleas in bar, the right of action, but it admits, at the same time, the plaintiff's allegations, and undertakes to

avoid them by averring a delivery to the plaintiff of goods and money in discharge of his demand. It is the reverse of the general issue; and, being an affirmative plea, concludes correctly with a verification. The plaintiff objects [\*355] also, to the substance of this \*plea; because it does not aver that he had accepted the goods and money in satisfaction. This objection is fatal to the plea, as a plea of accord and satisfaction. To make such a plea valid, it must not only aver that the goods were delivered in payment of the demand, but it must also aver that they were accepted in satisfaction and discharge thereof. *Drake v. Mitchell*, 3 East, 251. As a plea of payment, the plea is equally objectionable. It avers the payment to have been made in goods as well as money. But a plea of payment can not be supported, unless the payment has been made in money alone. Neither can this plea be supported as a plea of 'set-off' under the statute. The plea under the statute must, in the first place, be a good plea of payment; and, in addition, it must set out the matters of set-off. The plea before us, as has already been observed, is not a plea of payment, and is not therefore within the statute. Rev. Code, 1831, p. 405. The second plea, for these reasons, **can not be supported.**

The next ground taken by the appellant is that his third plea should not have been rejected. That plea is clearly objectionable. The contract on which the suit was brought is not described in the declaration as a sealed contract. Had it been so described, the plaintiff would have failed, of course, in his action of assumpsit. The defendant was bound to consider the contract relied on by the plaintiff as not being under seal, and to shape his defense accordingly. If the statement of this third plea be true, viz: that the only contract between the parties was one under their seals, the proper plea for the defendant was non-assumpsit. The plaintiff would have been, then, obliged to prove an unsealed contract, or to lose his cause. The special plea under consideration, which avers the contract to be a sealed one, is merely a denial, in an argumentative form, that the defendant had made the parol promise set

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out in the declaration. This plea, therefore, amounts to the general issue of non-assumpsit. It is a general rule of pleading in assumpsit that when the defendant wishes to deny the truth of the declaration, he must do so in a direct and positive manner, by pleading at once the general issue. If he state the matter in denial specially, as is done in this case, the plea may be good in substance, but it is objectionable in point of form. It violates the rule in pleading which forbids prolixity, and may be objected to on motion, or by special demurrer. [\*356] Gould on Pl., \*346, 350. In the present instance, there was a motion to reject the plea as amounting to the general issue, and the motion was correctly sustained.

The third ground relied on by the appellant is, that the Court refused to instruct the jury in the manner he requested, and that the Court gave instructions to the jury which were incorrect. It is the duty of the Circuit Court, upon the request of either of the parties, to inform the jury correctly as to any particular matter of law which may be applicable to the cause. And in order to test the propriety of any particular instruction to the jury, it is necessary to examine, first, the nature of the issue between the parties; secondly, the facts which have been proved; and thirdly, the law which must govern the case.

The action before us is an action of assumpsit. There are four counts in the declaration. The first is on a special contract by parol for the making and burning of a certain quantity of bricks by the plaintiff for the defendant, and the delivering of them to the defendant by a certain day, and at a certain place. The second is an *indebitatus* count, the third a *quantum meruit*, and the fourth a *quantum valebant* count, for bricks sold and delivered. To these counts is added the common breach. The only plea is non-assumpsit, and upon that issue is joined.

The substance of the testimony is as follows: Two kilns of bricks were made and burnt by *Patterson*. The first kiln contained about 156,000, and the second kiln about 66,000. The burning of the first kiln was completed about the last of *August*, 1831, and that of the second kiln about the last of *October*, in the same year. *Sinard* received and hauled away

the most of the bricks from both these kilns, soon after they were burnt, informing *Patterson* at the time that he would not take the bricks according to a previous agreement between them, but that he would pay for no more than he received. The bricks of both kilns taken together were as good as bricks commonly are, except that those of the first kiln were somewhat smaller than usual. The bricks hauled away by *Sinard* were made use of by him for his own benefit. The price of bricks at the time was about three dollars a thousand. The parties had, in *May*, 1831, entered into an agreement under seal, by which *Patterson* was to make and burn for *Sinard* 250,000 bricks, 125,000 of them to be delivered at the kiln by the 10th of *July*, 1831, and the other 125,000 by the 10th of [\*357] *August*, 1831. *Sinard* was \*to pay *Patterson* three dollars a thousand for the bricks delivered according to that agreement. He was also to furnish *Patterson* with 120 cords of wood, which were to be cut by the 15th of *June*, and delivered by the 10th of *July*, 1831. It was also proved that the parties had, by parol, varied the sealed agreement as to the wood, as to the quantity of bricks, which was reduced to somewhat less than 130,000, and as to the time for delivering the bricks. It was also proved that *Sinard* had delivered to *Patterson* about forty cords of wood, and had sold to him goods, &c., to the amount of about \$380. This embraces all the evidence that is material.

The next inquiry is as to the law applicable to the case, at least so far as respects the instructions to the jury which were refused, or which were given, by the Court. It is not necessary here to enumerate, particularly, the instructions which were refused or which were given. The only material questions raised by them are, first, Could the sealed agreement between the parties of *May*, 1831, be rescinded by any subsequent parol agreement of the parties? Secondly, if it could not, Is the existence of that sealed agreement a bar to the present action of assumpsit? Thirdly, if the Court incorrectly instructed the jury that the sealed instrument might be rescinded by parol, Can the defendant below complain of that instruction?



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The first of these questions must be answered in the negative. The agreement, under the seal of the parties, could not be rescinded by them by any parol contract which they could make. There is no principle of the common law better settled, than that an agreement under seal can only be dissolved *eo ligamine quo ligatur*. *Thompson v. Brown*, 7 Taunt., 656.

The second question must also be answered in the negative. The agreement under the seal of the parties, though unrescinded, was no bar to the present action of assumpsit. The appellant, in support of the contrary opinion, relies on the doctrine, that assumpsit on simple contract will not lie, where the plaintiff has a higher security for his demand. That doctrine is no doubt correct; but it is not applicable to the present case. Here, *Patterson* has no higher security for his demand, than the simple contract on which he sues. There is, to be sure, a sealed agreement between him and *Sinard* as to the burning and delivering of bricks; but the evidence on the record shows that *Patterson* can not support an action on [\*358] that agreement. He \*was bound by that agreement to deliver 250,000 bricks to *Sinard* within a given time; and that was a precedent condition to a claim for the price of the bricks. The proof is, that *Patterson* delivered no bricks to *Sinard* until after the expiration of the time limited for the delivery by the agreement; and that he never delivered to *Sinard* the quantity of bricks which, by that agreement, was required. Had *Patterson*, therefore, sued on the sealed agreement, he must have failed, because he had not performed the precedent condition, the performance of which was indispensable to his right of recovery on the agreement.

It is in vain to say, that by a subsequent parol agreement, the time for delivering the bricks was enlarged, and that the quantity of bricks to be delivered was reduced, *Patterson* could not, by showing the existence of such a parol contract, and the performance of it on his part, support an action on the sealed agreement. This has been frequently decided. The following are some of the authorities. An arbitration bond limited the time for the arbitrator to make his award. In debt on the

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bond, the declaration stated that the time was afterwards enlarged, by the mutual consent of the parties; and that within the enlarged time, the award was made. Breach, &c. To this declaration, the defendant demurred and obtained a judgment. The Court said, that the question was not then to be discussed, whether the party had not some remedy, but whether his remedy lay on the bond: to determine which the Court must look to the bond; and there it appeared that the defendant had bound himself to abide by an award under a penalty, if made within a given time: but that could never extend the penalty to an award made after that time under a new agreement. *Brown v. Goodman*, 3 T. R., 592, note. So, where a person covenanted to build two houses for £500 by a certain day, and, in an action of covenant for the money, averred in his declaration that the houses were built within the time, it was held that evidence that the time had been enlarged by a parol agreement of the parties, and that the houses had been built within the enlarged time, did not support the action. *Littler v. Holland*, 3 T. R., 590. The cases of *Heard v. Wadham*, 1 East, 619, *Leslie v. Dela Torre*, cited in *White v. Parkin*, 12 East, 583, *Thompson v. Brown*, 7 Taunton, 656, *Cordwint v.*

*Hunt*, 8 Taunt., 596, fully establish the doctrine which [\*359] governs the previous cases of *Brown v. Goodman*,\* and *Littler v. Holland*, to which we have referred. The cases all show, that the terms of a sealed agreement can not be varied by any parol contract, so as to authorize a suit on the sealed agreement, which suit, without the parol contract, could not have been sustained.

There can be no doubt, therefore, that the sealed agreement in this case, though unrescinded, furnished *Patterson* with no ground of action against *Sinard*; that it was not a higher security for the demand now sued for, and that its existence is no bar to the present suit.

The third question proposed must also be answered in the negative. That question is, whether an erroneous instruction to the jury that the sealed agreement might be rescinded by parol, can be assigned for error by the appellant? It does not

necessarily follow that because an instruction to the jury on a question of law is erroneous, the error can be complained of by either party. An erroneous instruction, to be assignable for error, must be such a one as is applicable to the cause, and may have injured the party who complains of it. It is true that if the evidence is not on the record, we must presume the instruction, when not foreign to the issue, to be applicable to the cause. *Peyton v. Bowell*, in this Court, *May* term, 1823. But when, as in the present case, the whole evidence is on the record, we must compare it with the instruction complained of, and ascertain whether the instruction is applicable to the evidence, and could injure the appellant. We have already shown that *Patterson* could not sue on the sealed agreement, and that his only action for the bricks sold and delivered was on the subsequent promise, either express or implied, upon which he has declared. The question, therefore, whether the sealed agreement was in force or had been rescinded, had nothing to do with the cause, and whether that agreement could or could not be rescinded by parol, was a mere abstract question of law. The evidence in the cause, and the law applicable to it, would have warranted the Court in instructing the jury to form their verdict as if the sealed agreement was not in existence. The instruction which was given had no tendency to a result beyond that. The Court informed the jury to disregard the sealed agreement, if it had been rescinded by the parties, and they informed the jury further, erroneously to be sure, that that agreement might be rescinded by parol. [\*360] The jury might, by \*these instructions, have been induced incorrectly to suppose the sealed agreement to be rescinded, but that belief could not have injured the appellant. Its effect could only have been to cause the jury to disregard the sealed agreement, and that is precisely what, by law, they were bound to do, not indeed because that agreement was rescinded, but because it had no connection with the cause of action. The instruction in question, consequently, can not be complained of by the appellant.

The last error assigned is that the Circuit Court erroneously

refused to grant a new trial. It is objected that the verdict is not supported by the law or the evidence. We have already had occasion to advert to both the evidence and the law of this case. There can be no doubt but that the appellee had a right to recover, upon the general counts of his declaration, for the bricks sold and delivered to the appellant. The verdict may be for a somewhat larger amount than we would have been disposed to give, had we been members of the jury. But the amount is not so obviously excessive as to authorize any interference with it by an appellate Court.

*Per Curiam*.—The judgment is affirmed, with costs.

*J. B. Ray* and *C. Dewey*, for the appellant.

*C. Fletcher. H. Brown, and W. Quarles*, for the appellee.

[\*361]

\*SUMMERS v. GLANCEY.

ATTACHMENT BOND—PAROL EVIDENCE TO VARY.—If the condition of a bond in domestic attachment, recite that the plaintiff *had* sued out the attachment, &c., parol evidence is not admissible to prove that the bond was executed *before* the issuing of the writ; but if the writ itself show that it issued *after* the execution of the bond, the recital to the contrary in the condition of the bond, will be no ground for quashing the writ (a).

APPEAL from the *Shelby* Circuit Court.

M'KINNEY, J.—Domestic attachment. In this case it appears that the defendant moved to quash the writ, on the ground that it appeared from the condition of the bond, that the writ was issued before the bond was filed in the clerk's office; and that the plaintiff then moved the Court to permit the clerk to endorse upon the bond, *nunc pro tunc*, that the same was filed, executed, acknowledged and approved, according to law, before the writ issued. The Court sustained the

(a) See *Root v. Monroe*, 5 Blackf., 594.



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Summers v. Glancey.

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defendant's motion, and quashed the writ, refused the plaintiff's motion, and further refused, upon the plaintiff's introducing witnesses, including the clerk of the court, to prove that the bond was actually filed in the clerk's office before the writ was issued, to hear any evidence upon the subject, for the reason that the allegation of the bond, that the writ of [\*362] attachment was issued \*before the bond was filed, estopped the plaintiff from contradicting or explaining that allegation.

The bond is dated the 13th of *April*, 1833, and is endorsed by the clerk, filed in his office on that day. The writ objected to is dated and was issued on the 16th day of the same month. The condition of the bond containing the recital is as follows: "Now the condition of this obligation is this, whereas the said *Abel Summers* hath on this day sued out of the office of the clerk of the Circuit Court of the said county, a writ of domestic attachment against the goods, &c., of the said *Joseph Glancey*, now if," &c., pursuing the statute. We think the recital forms a part of the bond, and that parol evidence was inadmissible to contradict it. On this point the Circuit Court was correct, and if the writ had been issued on the 13th, the day the bond was filed, instead of being issued on the 16th, it should have been quashed. In support of this, the case of *Hucheson v. Ross*, 2 Marsh. Rep., 349, is in point. Here, however, is a writ issued on the 16th, three days after the bond was filed. The writ and bond are both a part of the record. The bond is made so by a bill of exceptions. Although parol evidence could not be permitted to contradict the bond, yet the record—the writ and bond being a part of it—may be used to show that the recital in the bond, "that a writ had on that day issued," did not correspond with the fact furnished by the writ itself, that it did not issue until the 16th. No principle of law is violated by construing them together, but justice is promoted by enabling the plaintiff to avail himself of the benefit of the act, he showing that he has strictly complied with its provisions. We are therefore of opinion, that the Circuit Court erred in quashing the writ.

Hall v. Johnson.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. W. Wick*, for the appellant.

*C. Fletcher* and *O. Butler*, for the appellee.

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ROSS v. MISNER, in Error.

THE dismissal of a cause by the Circuit Court, on motion, without any reason appearing on the record in favour of or against the dismissal, must be presumed to be correct.

[\*363]

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HALL v. JOHNSON.

ESCAPE.—A *scire facias* can not issue, either at common law or by statute, against a sheriff or constable for an escape.

SAME.—An execution-creditor, in order to recover against the sheriff or constable for an escape, must aver and prove the existence of a judgment against the execution-debtor (a).

JUSTICE OF THE PEACE—PLEADING.—The pleadings before justices of the peace can not be objected to for want of form: *aliter*, as to substantial defects.

ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—A *sci. fa.* was issued by a justice of the peace, in which *Johnson* was the plaintiff and *Hall* the defendant. The *sci. fa.* was demurred to by *Hall*, and the justice rendered a judgment, on the demurrer, in favour of *Johnson*, for forty-nine dollars and sixty-eight cents, with interest and costs. The Circuit Court, on appeal by *Hall*, rendered a similar judgment against him, on his demurrer to the writ.

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(a) See *The State v. Johnson et al.*, 1 Ind., 158.

## Hall v. Johnson.

The *sci. fa.* reads as follows: "The State of *Indiana* to any constable in *Centre* township, *Marion* county, greeting: Whereas, *Abraham A. Hall*, constable, held an execution of *ca. sa.* against the body of *Philip Hedges*, dated the 28th of *January*, 1832, in favour of *D. H. Johnson*, issued by *Obed Foote*, a justice of the peace at *Indianapolis*; and whereas, the said *Abraham*, as appears from the return of said writ, took the said *Philip* into custody on the 10th day of *February*, 1832, and then, to wit, the same day released the said *Philip* from his said custody, without his having taken the insolvent oath, or having been otherwise legally discharged. You are therefore commanded to summon the said *Abraham* to appear before me, at my office in *Indianapolis*, on the 25th of *February*, 1832, at two o'clock P. M., to show cause, if any he can, why he has not made the said debt named in said execution, or held the said *Philip* in custody until legally discharged. Given under my hand and seal, this 20th of *February*, 1832. *Obed Foote*, justice, [L. S.]" In support of the demurrer to this *sci. fa.*, two grounds are relied on:

The first is that the action is for an escape, and that a *sci. fa.*, in such a case, will not lie. There can be no doubt but that the only cause of complaint contained in this writ is

[\*364] \*the constable's permitting the execution-defendant to escape out of custody. For such an injury, the only common law remedy against a sheriff is an action of trespass on the case. The statutes of *Edw. 1*, and *Rich. 2*, which are in force here, give a further remedy for an escape on execution by an action of debt. The plaintiff below has not thought proper to resort to either of these actions, but has chosen to proceed by a writ of *sci. fa.* The statute of 1831 is relied on for this mode of proceeding. R. C., p. 107, 108. This statute enacts that if a constable fail to make due return of process at the proper time, or within six days thereafter, or if he fail to pay over to the proper party, on reasonable demand, or to the justice in the absence of such demand, on the return day, or within six days thereafter, all moneys collected by him by virtue of his office, on execution or otherwise, or if he make a

Hall v. Johnson.

false return, he may be proceeded against by *sci. fa.* There are here three cases in which a *sci. fa.* may be issued against a constable. The first is for not returning process; the second, for not paying over money collected; and the third, for making a false return. It is clear that an escape on execution is not one of the cases embraced by this statute, and that the plaintiff below, therefore, in issuing this writ against the constable, mistook his proper remedy for the injury complained of.

Admitting, however, for the sake of argument, that a *sci. fa.* does lie against a constable for an escape, there is still a fatal objection to the one before us. This objection is that the writ does not aver the recovery of a judgment on which the execution issued. It is clear that before *Johnson* can recover against *Hall* for permitting *Hedges* to escape, he must prove that he had, previously to the execution, obtained a judgment against *Hedges*. *Johnson*, without such a judgment, had no right to the execution against *Hedges*, and could have sustained no injury from the escape complained of. If the proof of a judgment was essential to the support of the action, it follows of course that the existence of the judgment should have been averred in the *sci. fa.* This point was examined in the case of *The State, ex rel. Crane, v. Beem et al.*, at the *May* term, 1833 (1). That was an action of debt upon a sheriff's bond, brought by the execution-creditor against the sheriff and his sureties, for an escape. We there held that, before the plaintiff could recover, he must aver in his declaration, and [\*365] prove at the trial the existence of a judgment \*against the execution-debtor. That case can not be distinguished, in principle, from the one before us. The issuing of a *sci. fa.* against an officer for an escape, differs only as to the form of proceeding from an action of debt, or on the case against him for an escape. The foundation of the action in the one case is the same with that in the other. The *sci. fa.*, like the declaration in debt or case, must show a good cause of action. It must show the judgment, the execution, the arrest, and the escape. It is true that, as the case before us was commenced before a justice of the peace, objections to mere



## Bastion v. Dalrymple.

form can not be insisted on. But, as to matters of substance, the rules must be the same, whether the action be instituted before a justice, or in the Circuit Court. The omission, in this case, to aver the existence of a judgment against the execution-debtor, is a fatal objection to the substance of the writ.

There are two grounds, therefore, upon which the demurrer to the *sci. fa.* ought to have been sustained. First, because it exhibits a case in which a *sci. fa.* is not authorized to issue. Secondly, because, if it could issue, the writ is substantially defective. The judgment of the Circuit Court, sustaining the *sci. fa.* is consequently erroneous, and must be reversed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*W. W. Wick*, for the plaintiff.

*H. Brown*, for the defendant.

(1) Ante, p. 222.

## BASTION v. DALRYMPLE.

**AMENDMENT—PRACTICE.**—Leave to amend a defense, on an appeal from a justice of the peace, will not be granted by the Circuit Court, if the nature of the proposed defense be different from that relied on before the justice.

Ω **ERROR** to the *Rush* Circuit Court. *Dalrymple* was the plaintiff below and *Bastion* the defendant.

**M'KINNEY, J.**—Debt before a justice of the peace on a writing obligatory. Appeal to the Circuit Court, and motion by the defendant below to amend his defense by filing a special plea, on payment of costs; no plea or written defense [\*366] having \*been filed before the justice. The motion was overruled, and judgment rendered in favour of the plaintiff.

A bill of exceptions, taken to the opinion of the Court in refusing the amendment, makes the special plea a part of the record. It is necessary to examine this plea to determine, if

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the permission to file it had been granted, whether the defense would have been changed in the Circuit Court; for, upon this depends the correctness of the opinion of that Court.

The defendant, on *oyer*, says *actio non*, because he says, that heretofore, to wit, on, &c., the day on which the said writing obligatory in plaintiff's declaration mentioned, was executed by the defendant to the plaintiff, the plaintiff sold a certain clock at and for the sum of money specified in said writing obligatory, and delivered the said clock to the defendant for the sum mentioned in said writing obligatory, and warranted the said clock on the sale aforesaid to the defendant, to be sound and to keep good time for the space of one year; and if the clock aforesaid did not keep good time for the space of one year, that he the plaintiff would take the said clock back and give up the note; and the defendant says, that the said writing obligatory in the plaintiff's declaration mentioned was given in consideration of the clock sold as aforesaid, and on no other consideration whatever; and that the said clock was not sound, and did not keep good time for the space of one year; and that the plaintiff did not take back the said clock and give up to the defendant the note aforesaid, but wholly failed, &c., although the plaintiff, on, &c., had notice of the unsoundness of the said clock, and that it did not keep good time for the space of one year; without this, that the said writing obligatory was given for a good consideration, wherefore, &c.

Without analyzing the plea, it is obvious that if it had been admitted, and an issue on it tried, the ground assumed by the defendant below in the Circuit Court, would have been entirely different from that before the justice of the peace.

It is however contended, that the amendment proposed is authorized by the 5th section of the act of 1833, p. 112. By that section, a modification of the provisions of the 26th section of the justices' act of 1831, Rev. Code, 1831, p. 301, a plaintiff, on an appeal, is permitted to amend his cause of action in the

Circuit Court, without, however, changing the form  
[\*367] of action, \*upon the payment of all the costs that may have accrued up to the time of amendment, or

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by securing the same to be paid, &c.; and the defendant in like manner is entitled to amend his defense under the same terms as the plaintiff may amend his cause of action. The plaintiff then, although permitted to amend his cause of action, is precluded from changing the form of the action, and the right, as limited, being extended to defendants, it is material to inquire to what kind of defense the amendment shall apply? This is answered by the act regulating the jurisdiction and duties of justices of the peace, Rev. Code, 1831, in the 26th section of which we find that "the defendant, if he have any special matter of defense in actions of tort, or any special matter of payment, set-off, or other affirmative plea, in actions of contract, shall, before trial, file the same, or a succinct statement thereof, in writing." The same section gives a defendant the benefit of the general issue, without pleading it, if wished. The act of 1833, authorizing an amendment of the defense, must be construed in connection with the act of 1831, and the construction, as far as this action on contract is concerned, must be confined to the amendment of special matter of payment, set-off, or other affirmative plea, which the defendant, before the trial before the justice, shall have filed, or of which he shall have filed a succinct statement in writing.

Taking the two acts then together, it would seem clear that the amendment authorized by the act of 1833 is of such a defense as is required by the 26th section of the act of 1831. The defense by the latter act, that of 1831, is confined to special matter of payment, set-off, or other affirmative plea, and such defense must be in writing. The general issue can not be embraced in this description, and a construction which would authorize the amendment of the general issue, whether it be filed in writing, or the benefit of it be enjoyed by operation of law, would be a departure from those rules which govern in the construction of statutes.

We think the Circuit Court was correct in refusing leave to amend (1).

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Hoyt v. Reed.

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*Per Curiam*.—The judgment is affirmed, with costs.

*J. Perry*, for the plaintiff.

*O. H. Smith*, for the defendant.

(1) *Vide Stat.* 1836, p. 62; *Nelson v. Zink*, ante, p. 101, and note (2).

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[\*368] \**HOLCOMB v. JOHNSON and Others*, on Appeal.

AN execution in favour of *Johnson* and others was levied on certain goods as the property of *Rogers*, the execution-defendant. *Holcomb* claimed the goods, and a jury, summoned under the statute to try the right of property, determined in favour of the claimant, and found the probable value of the goods to be \$152. One of the execution-plaintiffs prayed an appeal, the others, according to the justice's entry on his docket, saying they would proceed no further. The appeal was granted, and the cause tried in the Circuit Court without any objection as to parties: a verdict and judgment were rendered that the property was subject to the execution, and a judgment was given against the claimant for costs.

*Held*, that there was no error in the proceedings.

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### HOYT v. REED.

**LIMITATIONS—STATUTE OF.**—The payee of a note sold it before it was due, affirming the maker to be solvent, and the purchaser afterwards sued the seller in assumpsit, in consequence of the maker's insolvency, to recover back the money paid for the note. *Held*, that if five years had elapsed from the time the note became due, before the commencement of the suit, the statute of limitations might be pleaded.

**SAME.**—The statute of limitations may be pleaded in a suit before a justice of the peace.



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Hoyt v. Reed.

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ERROR to the *Marion* Circuit Court.

BLACKFORD, J.—*Reed* commenced an action of assumpsit against *Hoyt*, in *November*, 1832, before a justice of the peace, and obtained a judgment. *Hoyt* appealed to the Circuit Court. The cause of action was as follows: *Hoyt* sold to *Reed* a promissory note executed by *J. Johnson* and *J. Clements* to *Seely & Hoyt*, or order, for the payment of forty-five dollars. The note was dated in *November*, 1825, and was payable one year after date. The note was not assigned by *Hoyt*, but only delivered by him to *Reed*, *Hoyt* stating, at the time, [\*369] that the makers were \*solvent. The note was not due at the time of this transaction. The defendant pleaded the general issue and the statute of limitations.

It was proved that *Reed*, in consideration of the delivery to him of the note of *Johnson* and *Clements*, gave his note to *Hoyt* for forty dollars, payable in furniture. *Hoyt* refused to assign the note, but stated that the makers were solvent and would pay the note on demand. It was also proved that *Johnson* and *Clements*, at the time *Reed* received the note, were insolvent, and continued to be so at the time the note became due, and when this action was brought. The Circuit Court gave judgment in favour of *Reed* for fifty-seven dollars in damages.

The counsel for the plaintiff in error relies on two grounds for the reversal of this judgment. First, that as there was no fraud, nor any assignment of the note, there is no cause of action. Secondly, that the suit is barred by the statute of limitations. We shall not stop to examine the first error assigned, the case being clear on the second. The suit is founded on a parol agreement between the parties. *Reed* says that *Hoyt* promised him, that if the makers did not pay the note, he would return to him, *Reed*, the amount which he paid *Hoyt* for the note. There was no promise in writing, nor was there, indeed, any express promise even by parol. All that *Reed* relies upon is, the assumpsit of *Hoyt* implied from the nature of the transaction. The circumstance, therefore, that the statute of limitations does not extend to written contracts, is no objection to its application in the present case.

Hoyt v. Reed.

*Johnson* and *Clements* being insolvent at the time the note was delivered to *Reed*, as well as at the time when it became due, the cause of action in favour of *Reed* against *Hoyt*, if any ever existed, could not have accrued at a later period than the time when the note became due, which was in *November, 1826*. The suit was not commenced before the justice until *November, 1832*, which was about six years after the cause of action can be supposed to have accrued. There is, consequently, no ground for saying that the time limited by the statute had not expired at the time when this suit was commenced.

The principal ground relied on by *Reed*, to avoid the statute, is, that it is not applicable to cases, which, like the present, are within the jurisdiction of a justice of the peace. This objection is without foundation. The words of the statute [\*370] are, that "all \*actions of debt on simple contract and for rent arrear, actions on the case, other than for slander, actions of account, trespass, trespass *quare clausum fregit*, detinue and replevin for goods and chattels, shall be commenced within five years after the cause of action accrued and not after." R. C. 1831, p. 401. This is a general provision, and must be considered applicable, not only to actions which must be commenced in the Circuit Court, but to those within the jurisdiction of a justice. There is no such exception to the statute as that contended for by *Reed*. It would be very unfortunate if there were. Statutes of limitations have always been considered exceedingly valuable; and have been, very appropriately, termed statutes of repose. They induce persons to settle their accounts much more frequently than they otherwise would; and they prevent, in innumerable instances, the institution of suits for demands which had been long before satisfied. We find nothing in the language of the statute, nor in its spirit, that would authorize us to exclude from its beneficial effects the numerous and important contracts which are within the jurisdiction of justices of the peace.

It is our opinion, therefore, that the statute of limitations is a bar to the action under consideration, and that the judgment of the Circuit Court should have been for the defendant below.

## Tyner v. Gapin.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*W. W. Wick*, for the plaintiff.

*C. Fletcher*, for the defendant.

## TYNER v. GAPIN.

ATTACHMENT—PRACTICE.—A third person claimed property in goods, levied on by virtue of an attachment, and, on a trial of the right of property, obtained a verdict. The creditor appealed, and the Circuit Court, on the claimant's motion, dismissed the suit on the ground that the attachment had irregularly issued. *Held*, that the irregularity complained of was no ground for dismissing the suit.

ERROR to the *Hancock* Circuit Court.

M'KINNEY, J.—*Tyner* sued out a writ of domestic attachment against *William Brown*, and the officer to whom [\*371] the writ was \*directed attached certain property of *Brown*, to which the defendant in error, *Gapin*, asserted a claim. A trial of the right to the property claimed was had, and a judgment on the verdict of the jury, in favour of the claimant, rendered. An appeal was taken to the Circuit Court; the cause, without the intervention of a jury, submitted to the Court; and judgment rendered in favour of the claimant.

A bill of exceptions shows that *Gapin* moved the Court to dismiss the case, alleging that the original proceeding and papers in the attachment, in which *Lewis Tyner* was plaintiff and *William Brown* defendant, were illegal and void, all the original papers in the attachment having been sent up with the appeal; that this motion was sustained by the Court, and judgment rendered that the attached property be returned to *Gapin*, on the ground that the bond of the plaintiff in attachment was not filed until after the writ had issued; that *Tyner*, the defendant below, then moved the Court to allow him to

prove by the justice of the peace, by whom the writ was issued, that the bond was filed in his office before the writ issued, which was refused by the Court. To the opinion of the Court sustaining the motion to dismiss the case, and to its refusal to admit the testimony offered, *Tyner* excepted.

Several points are made; the material one, however, and that to which our attention will be directed, is as to the dismissal of the case.

On a trial of the right of property, whether it be held by a *fi. fa.* or a writ of attachment, the only question to be decided is to whom, to the claimant or the execution-defendant, does the property in question belong? The claimant, if he recover, must prove that the property is his. No proof by him of tortious conduct on the part of the officer, or of irregular or **erroneous** process sued out by the plaintiff, can dispense with **this duty**. **It is imperative.** The assertion of a claim to the property, and the adoption of this statutory and summary mode of determining his right, is an admission of the legality of the levy, precluding him from attacking the process. It is a choice of several remedies for his protection afforded by the law, and his election does not clothe him with the power thus collaterally of defeating a judicial proceeding to which he is not a party. If the writ of attachment was wrongfully sued out, the bond of the plaintiff affords ample protection to the defendant [\*372] \*in that suit; or he may, at a proper time, move to quash the proceedings, if there be a departure from the statute, for no doctrine appears to be better settled than that which requires from a party adopting this remedy a strict and literal conformity to the provisions of the statute. The construction is strict, and no intendment in favour of the plaintiff admitted.

This view of the case renders it unnecessary to advert to the refusal of the Court to admit the testimony offered by the defendant below.

We are therefore of opinion that the Circuit Court, in dismissing the case, erred, and that the judgment must be reversed.



## Titus v. Scantling and Wife.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*W. W. Wick*, for the plaintiff.

*C. Fletcher*, for the defendant.

## TITUS v. SCANTLING and WIFE.

**ACTION ON BOND—PLEADING.**—It is not necessary, in an action on a bond conditioned for the performance of an award, that a plea in bar admitting the execution of the bond, but denying that any award had been made, should be verified by affidavit.

**SAME.**—A plea in such case, averring the bond to be void by the statute of another State where it was executed, should set forth particularly the statute relied on.<sup>(a)</sup>

APPEAL from the *Shelby* Circuit Court.

**STEVENS, J.**—*Scantling* and wife, plaintiffs in the Court below, declared against *Titus*, the defendant below, upon a bond made to the wife while sole, for the payment of \$1,000, conditioned for the performance of an award, &c. The declaration, after stating the bond and condition, alleges the making of the award, &c., and that certain sums of money were awarded to be paid to the wife, she still being sole, by the defendant, &c., of which he had notice, &c. It is then specially averred that the plaintiffs, in all things, kept and performed the award on their parts, but that the defendant had failed to pay the money, &c. The declaration shows, upon its face, that the bond and condition, and the award, were made in *Butler* county, in the State of *Ohio*, and that the cause of action arose there, &c.

The defendant craved *oyer* of the bond and condition, [\*373] and then \*pleaded four special pleas in bar. The first two pleas were demurred to, and the demurrers sustained by the Court; the third plea was set aside on motion of

<sup>(a)</sup>See *Irring v. McLean*, 4 Blackf., 372.

## Titus v. Scantling and Wife.

the plaintiffs, and issue to the country was taken upon the fourth plea, a jury trial had, and a verdict and judgment rendered for the plaintiffs, and the defendant appealed to this Court.

The first question presented for our consideration is, whether the Court erred in setting aside the defendant's third plea. The third plea admitted the making the bond and condition, but denied that any award was ever made in manner and form as required by the condition of the bond. The appellees insist that this plea was correctly set aside, because it was not sworn to as is required by the 21st section of the practice act of 1831, p. 403. By that section it is declared that "no plea in abatement, plea of *non est factum*, non-assignment, or other pleadings denying or requiring proof of the execution or assignment of any bond, bill, release, or other instrument of writing which is the foundation of any suit or defense, and is specially set forth in the declaration, plea, or other pleadings, shall be received unless supported by oath or affirmation." The only difficulty in this case is to determine whether the award denied by this plea is the foundation of the plaintiffs' action. If it is not the foundation of the action, the statute does not require a plea denying its existence to be sworn to. When a submission is made by bonds, and the award is merely to pay money, the plaintiff has his choice of three different modes of proceeding. He may sue upon the bond without stating the condition, 1 Saund., 168; or he may, in his declaration, set out the bond and condition, and the award, and assign his breaches; in either of these modes, the bond is the foundation of the action, and the award is merely matter of inducement: or he may declare upon the award itself, and then the award is the foundation of the action. In the case now under consideration the suit is upon the bond, and the award is not the foundation of, but the inducement to the action, and a plea denying its existence need not be sworn to. 2 Chitt. Pl., 189, note (u).

The next question is, were the demurrers to the first two pleas correctly sustained? As to the second plea, we think it entirely insufficient, and that the demurrer to it was correctly

## Titus v. Scantling and Wife.

sustained. The first plea presents a more serious  
[\*374] question, and \*must be carefully examined. It admits  
the making of the bond and condition, and the making  
of the award, but avers that they were all made in the county  
of *Butler* and State of *Ohio*, and that the cause of action arose  
there, and that by the laws of the State in force there at that  
time, the said bond was and still is, in that State, void, and  
that, therefore, it is void in the State of *Indiana*. The special  
causes, reasons and facts why it is void are set forth in the  
plea, and the plea concludes with a proper verification, &c  
The point of controversy arising upon this plea is, whether, if  
the subject-matter is properly pleaded, it is sufficient to bar the  
action? Questions have frequently arisen in the courts of jus-  
tice in the *United States*, on the effect to be given to foreign  
laws, when brought into view in discussions concerning per-  
sonal rights and contracts. The great question is, how are  
contracts made abroad to be construed, and in what manner  
and to what extent are they to be enforced and discharged,  
when the law of the country in which they were made, and  
the law of the country in which performance is sought, are in  
collision?

The doctrine of the *lex loci* is replete with subtle distinctions  
and embarrassing questions, which it is said have exhausted  
the learning and skill of the most distinguished jurists and  
civilians. But generally speaking, a contract valid by the law  
of the place where it is made, is valid everywhere. This rule  
is founded on the tacit consent of civilized nations, arising  
from its general utility, and seems to be a part of the law of  
nations, adopted by the common law. Still it is true, as a  
general proposition, that the laws of a country have no bind-  
ing force beyond its territorial limits; and their authority is  
admitted into other States, not from their binding force, but  
on the principle of comity; and every independent State will  
judge for itself, how far the principles and rules of comity are  
to be permitted to interfere with its domestic interests and  
policy. No community is bound to enforce or hold valid in  
their courts of justice, any contract which is injurious to their

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public rights, or offends their morals, or contravenes their policy, or violates a public law.

There are, however, certain general rules in respect to the admission of the *lex loci contractus*, which have been illustrated by jurists, and recognized in judicial decisions, which may be resorted to as safe landmarks in the consideration of [\*375] this case \*now before us. It appears to be a settled rule of decision, that personal contracts are to have the same validity, interpretation, and obligatory force in every other country, which they have in the country where they were made, or where they were to be executed; and the contract is to be presumed to be made in reference to the laws of the country in which it is made, unless the intention of the parties to the contrary be clearly shown. Hence, it is a consequence of this admission of the *lex loci*, that contracts, void by the law of the land where they are made, are void in every other country. *Pearsall et al. v. Dwight et al.*, 2 Mass. Rep., 84; *Nash v. Tupper*, 1 Caines' Rep., 402; 4 Dallas' Rep., 327; *Alves v. Hodgson*, 7 T. R., 237; *Desesbats v. Berquier*, 1 Binn. Rep., 336; *Houghton v. Page*, 2 N. Hamp. Rep., 42; 2 Kent's Comm., 453, *et seq.*

The only question left undisposed of as to this plea is, whether the averments contained in it are sufficient? It is a rule about which there is no controversy, that courts of justice can not judicially take notice of foreign laws—they must be specially pleaded. Whether the bond in question in this case is void by the laws of the State of *Ohio*, is a question of law for the Court to decide; and the plea should, particularly, set forth and show to the Court the law relied upon, so that the Court might determine from the face of the plea, whether, if there were such a law in force in the State of *Ohio*, the bond was void or not. The general allegation, that the bond is void by the laws, &c., is not sufficient; that is only the conclusion of law, which the Court alone has a right to judge of, and not the party pleading. *Pearsall et al. v. Dwight et al.*, 2 Mass. Rep., 87, 88; *Walker et al. v. Maxwell*, 1 Mass. Rep., 104; *Beauchamp v. Mudd*, Harden's Rep., 163 (1).



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Again, if a contract be made in one country, to be executed and performed in another, it is presumed that the parties had reference to the laws of the country where the contract was to be performed; and the law of that country will govern the contract in respect to its construction and force. The plea then, in this case, should have averred that the bond was made in reference to the laws of the State of *Ohio*, and was to be there executed and performed. This averment would have been proved by proving that the contract was made in the State of *Ohio*, unless the contrary was shown; for the presumption of

[\*376] law is, that the contract is made in reference to the laws of \*the country where the parties enter into it, unless the contrary is clearly shown. The demurrer then to this plea appears to have been also correctly sustained.

But the Court having committed an error, as we think, in setting aside the defendant's third plea, the judgment must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*P. Sweetser*, for the appellant.

*W. W. Wick* and *O. Butler*, for the appellees.

(1) Accord, *Elliott et al. v. Ray*, Vol. 2 of these Rep., 31, and note (2); *Cone v. Cotton et al.*, *idem*, 82, and note (2).

## REED and Others v. CARTER.

**JUDICIAL SALE—FRAUD.**—A sheriff, by virtue of an execution on which about twenty dollars were due, sold one hundred acres of land belonging to the execution-defendant, worth from \$1,000 to \$2,000, when four or five acres, which might have been conveniently taken from one side of the tract, could have been sold for a sufficient sum to satisfy the execution. *Held*, on a bill filed by the execution-debtor, that the sale was fraudulent and void (a).

(a) *Catlett v. Gilbert*, 26 Ind., 614; *Lashley v. Cassell*, *id.*, 606; 1 *id.*, 575; 30 *id.*, 332.

## Reed and Others v. Carter.

ERROR to the *Harrison* Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed by *Daniel Carter* against *James Reed*, *Samuel S. Lansdale*, *Jesse Shields* and *Jonathan Keller*. The bill states, among other things, that a tract of land belonging to the complainant, had been fraudulently sold on an execution against him, and purchased by *Reed* and *Lansdale*, two of the defendants. The object of the bill was to set aside the sale as fraudulent and void.

The material facts are as follows: *Shields* was the sheriff of the county, and *Keller* was his deputy. A *feri facias* against the complainant had been placed in the hands of a previous sheriff, had been levied on the tract of land now in question, and had been returned with an endorsement that the land had not been sold for want of time. A *venditioni exponas* was afterwards issued, and *Keller*, as deputy sheriff, sold the land to *Reed* and *Lansdale* for the sum of \$351.25. The [\*377] \*balance due on the execution, at the time of the sale, was only about twenty dollars. A short time before the sale the complainant, being about to set out for *New Orleans*, had a conversation with *Keller* respecting the execution, and had some reason to suppose, from *Keller's* language, that the sale would be postponed until after his return. Immediately after the complainant's departure for *New Orleans*, the sale complained of took place. The tract of land sold is situated on the *Ohio* river, has a large improvement on it at the upper end, and is very valuable. It contains 100 acres, and is worth from \$1,000 to \$2,000. Four or five acres might have been conveniently taken from the upper end of the tract, and could have been sold for more than sufficient to pay the small balance due on the execution. No part of the purchase-money has been received by the complainant, and the whole of it, as is said, is in the hands of the clerk of the Circuit Court.

The decree of the Circuit Court is that the sale be set aside that the sheriff be enjoined from perfecting the title to the purchasers, that the clerk pay to the purchasers the purchase-money deposited with him, and that the complainant recover his costs against the defendants, *Reed* and *Lansdale*.

This Court had an opportunity, at the *November* term, 1825, to examine the facts which are now presented to the Court, for the second time, by the same parties. It was not proper, on that occasion, to decide on the merits of the controversy, but the Court intimated an opinion that the sheriff's sale could not be sustained in a court of chancery (1). That opinion is confirmed by an examination of the record now before us. The sheriff had no right to sell a tract of land containing 100 acres, and worth between \$1,000 and \$2,000, merely to raise the trifling sum of twenty dollars, when the sale of four or five acres alone, which might, with propriety, have been separated from the tract, would have produced the amount due. The rule for the sheriff, in these cases, is correctly stated by the Court of Chancery of *New York*. The Chancellor, in a late case there, says that "the proposition is not to be disputed that a sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently and reasonably detached from the [\*378] residue of the \*property, and sold separately." *Tiernan v. Wilson*, 6 Johns. Ch. Rep., 411. There is a still more recent decision by the Supreme Court of *New York*, establishing the same doctrine. In the latter case, an estate worth \$10,000 was sold by the sheriff to satisfy a debt of \$100, and it appeared that a small part of the property might have been separately sold for a sufficient sum to satisfy the execution. The Court did not hesitate, though no express fraud was proved, to set aside the sale. *Groff v. Jones*, 6 Wend., 522. Were courts of justice to countenance such sales as the one presented by the record before us, the greatest oppression and injustice would be the necessary consequence.

The sheriff, in this case, in selling 100 acres of valuable land to raise the small sum which he was authorized to collect, committed a breach of duty; his conduct was a fraud on the complainant, and the sale must be set aside. We do not discover, however, anything in the record which authorizes a decree against the defendants, *Reed and Lansdale*, for the costs

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The State, on the relation of Howe, Treasurer, v. Evans and Others.

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of suit. No particular acts of fraud appear to have been committed by either of them.

That part of the decree, therefore, which sets aside the sale, and enjoins the sheriff from perfecting the title to *Reed* and *Lansdale*, and that part also which requires the clerk to pay the purchase-money in his hands to the purchasers, must be affirmed; but that part of the decree which requires the defendants, *Reed* and *Lansdale*, to pay costs to the complainant, must be reversed.

*Per Curiam*.—That part of the decree which sets aside the sale, and requires the clerk to pay, &c., is affirmed: the other part is reversed. Cause remanded, &c.

*R. Crawford* and *H. H. Moore*, for the plaintiffs.

*C. Dewey*, for the defendant.

(1) *Reed v. Carter*, Vol. 1 of these Rep., 410.

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[\*379] \*THE STATE, on the relation of HOWE, Treasurer, v. EVANS and Others.

**ACTION ON BOND—PLEADING.**—Debt on a collector's bond. Breaches assigned that the collector had failed to pay over to the treasurer of the county the taxes assessed thereon, or to account to him for the same in the manner provided by law. *Held*, on special demurrer, that the breaches were insufficient.

ERROR to the *Owen* Circuit Court.

M'KINNEY, J.—This is an action of debt brought against a collector of the State and county revenue, and his sureties, upon his official bond. The bond has the following condition: "That the said *Andrew Evans*, jun., will well and truly discharge the duties of collector of the State and county revenue of the county of *Owen* and State of *Indiana*, for the year 1829, and pay over the same as by law required."



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The State, on the relation of Howe, Treasurer, v. Evans and Others.

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In the declaration the plaintiff avers "that the said *Andrew Evans*, jun., has wholly failed to discharge his duty as such collector, that he has wholly failed and neglected to pay over the taxes assessed on the said county of *Owen* to the treasurer of said county, or to account therefor to the said treasurer, in the manner provided by law." The plaintiff further avers the meeting of the assessors of the several townships of said county of *Owen*, at the office of the clerk of the Circuit Court, on the first Monday of *May*, 1829; that they compared and corrected their several assessment rolls, and on the same day delivered them to the clerk; that he filed the same in his office, and made out, on the 10th day of *May*, 1829, a true transcript of said assessment rolls, and on the said day delivered the same, with a precept in the name, &c., to said *Evans*, commanding, &c.

The defendants on *oyer* of the bond and condition demurred specially, alleging: 1. That the breaches are insufficiently set forth in this, that failing to pay over the taxes, or to account to the treasurer in the manner provided by law, is too general. 2. The declaration should aver that the taxes were collected to authorize the averment that they were not paid over. 3. The amount of the taxes collected and not paid over is not set out. 4. The averment should be that he failed to collect the taxes, or that he collected them and failed to pay them over.

[\*380] \*The demurrer was sustained by the Circuit Court, and judgment rendered in favour of the defendants.

At the *May* term, 1831, this case was before us; the judgment was reversed, and the cause remanded with directions to the Circuit Court to permit the plaintiff to withdraw his joinder in demurrer, and amend his declaration. In the opinion then delivered, it was said that the breach, "that the said *Andrew Evans*, jun., has wholly failed and neglected to discharge his duty as such collector," was insufficient; that instead of this general breach, the plaintiff should specify in what manner the defendant had neglected and failed. It was further said, that the breach "that the said *Andrew Evans*, jun., has wholly neglected and failed to pay over the taxes

The State, on the relation of Howe, Treasurer, *v.* Evans and Others.

assessed on his said county," was also insufficient (1). These two breaches occur in the present declaration, and although to the second breach are superadded, after the word county, the following words, "of *Owen*, to the treasurer of said county, or to account therefor to said treasurer, in the manner provided by law;" yet it is thought that these words do not change the legal effect of the breach. This addition can only be considered as a consequence of law, for if he failed to pay over the taxes, the failure must have occurred in the non-payment to the treasurer of the county, as he is alone authorized to receive the money from the collector.

By the acts in force at the time the bond sued on was executed, the clerk of the Circuit Court was required to make out a complete duplicate or transcript of the assessment rolls, and deliver the same, together with a precept in the name of the State, tested by the clerk and under the seal of the court, directed to the collector of the county, commanding him to collect the taxes, &c., and pay over the money collected by him, by virtue of the precept, as directed by law, and return such precept together with the transcript of the roll aforesaid, with an account of his acts thereon, to the said clerk on or before, &c. For failing to return the precept and duplicate, or making a false return, the collector is subject to a suit by the auditor of public accounts, or by the county treasurer, and the judgment upon a suit by either, shall be for the full amount of the taxes for the State and county revenue, as contained in the transcript of the assessment rolls, together with the commission, damages, costs, and charges, given by those [\*381] acts. From these \*provisions, it would seem that the situation of the collector of the State and county revenue was analogous to that of a sheriff, in whose hands had been placed an execution.

In a suit on a sheriff's bond by a plaintiff in an execution, to recover the amount of an execution collected by the sheriff, it is surely necessary to aver that the sheriff collected the amount of the execution. It is the fact of such collection, and the injury arising from its non-payment, that warrant the suit.

Brown v. Modisett.

If he has returned the execution without making the money, having used proper diligence, he is not so responsible. If he has failed to return it within the prescribed time, the amount of the execution, exclusive of the damages given by statute, determines the extent of his liability. If he has made a false return, appropriate averments, with testimony to sustain them, will secure redress.

We are of opinion that the objections were well taken to the declaration, and that the Circuit Court was correct in sustaining the demurrer.

*Per Curiam*.—The judgment is affirmed, with costs

*I. Naylor*, for the State.

*C. P. Hester*, for the defendants.

(1) *Evans et al. v. The State*, Vol. 2 of these Rep., 387.

### BROWN v. MODISETT.

**APPEAL—JURISDICTION.**—The Circuit Court has no jurisdiction in the case of an appeal from the judgment of a justice, unless the transcript be filed in the clerk's office within twenty days after the appeal-bond is filed.

**ERROR** to the *Vermillion* Circuit Court. The judgment of the Circuit Court, in this case, was in favour of *Modisett*.

**BLACKFORD, J.**—*Modisett* sued *Brown* before a justice of the peace, and recovered a judgment for a certain sum of money. The judgment was rendered on the 22d of October, 1831. *Modisett*, not being satisfied with the amount of the judgment, went to the justice on the 2d of November, 1831, prayed an appeal, and filed an appeal-bond with sureties to the satisfaction of the justice. On the 5th of December, 1831, the justice delivered the transcript and papers to the clerk of the Circuit Court.

[\*382] \*At the next term of the Court, which was in March, 1832, the appeal, on motion of *Brown*, was

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dismissed, because the papers had not been filed in the clerk's office within twenty days after the filing of the appeal-bond. On the next day after the appeal was dismissed, the cause, on motion of *Modisett*, was reinstated on the docket. The grounds on which the cause was reinstated, and which were supported by the affidavit of *Modisett*, were, that he had merits, and that the circumstance of the papers not having been filed in time was owing to the improper conduct of the justice in not filing them.

*Brown*, the plaintiff in error, contends that the Circuit Court had no right to reinstate this case. He relies for this, on the 72d section of the act respecting justices of the peace. Rev. Code, 1831, p. 317. That section requires the justice, when an appeal is taken, to cause the transcript and papers to be filed with the clerk of the Circuit Court, within twenty days after the appeal-bond is filed. The transcript, in the case before us, was not filed within the twenty days, and still the Court permitted the cause to be docketed. In the act organizing the Supreme Court, the party has sixty days from the time of taking the appeal, to file the transcript in the Supreme Court; and there is a provision in the act, authorizing the Court, on good cause being shown, to receive the papers afterwards. Rev. Code, 1831, p. 149. But there is no such provision, in the act respecting justices of the peace, authorizing the Circuit Court to receive the justice's transcript after the limited time. It must be filed within twenty days after the appeal is taken, or the Circuit Court has no jurisdiction.

*Modisett*, the defendant in error, to support the decision of the Circuit Court, in admitting this case on the docket, relies upon the 74th section of the act to which we have already referred. It is enacted by that section that if the party has been prevented from taking an appeal within thirty days from the date of the judgment, by the improper conduct of the justice, the Court may give further time for taking the appeal. This provision is confined to cases where the party has been prevented, by the misconduct of the justice, from taking an appeal within the limited period. But that is not the complaint in



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the case under consideration. *Modisett* was not prevented from praying an appeal and filing his bond within the thirty days from the rendition of the judgment. He does not [\*383] pretend that \*he was. On the contrary, the record shows that he took his appeal within the thirty days. There is no question about that. The 74th section of the statute referred to, has, therefore, no application to the case before us. The difficulty here is, that the justice failed to file his transcript within the prescribed time; and the statute gives no authority to the Court to permit the transcript to be afterwards filed. There is, perhaps, a defect in the law; but that can be remedied only by the legislature, not by the Court. See *Barnes v. Modisett*, May term, 1833 (1).

The Circuit Court did right, in the first instance, in dismissing the appeal, but it committed an error afterwards in permitting the cause to be again docketed.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*J. Whitcomb*, for the plaintiff.

*J. Farrington*, for the defendant.

(1) Ante, p. 253.

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 THROGMORTON v. DAVIS and WIFE.

**HUSBAND AND WIFE—SLANDER—PLEADING.**—In an action of slander by a husband and wife, the declaration must not conclude to the damage of the wife only, but to the damage of the husband and wife (a).

ERROR to the *Franklin* Circuit Court.

**BLACKFORD, J.**—This was an action of slander, brought by *Asa Davis* and *Susanna*, his wife, against *Joseph Throgmorton*. The words for which the action was brought are charged in

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(a) See *Collins v. Brown et ux.*, 8 Blackf., 262.

## Throgmorton v. Davis and Wife.

the declaration to have been spoken by *Throgmorton* concerning the wife of *Davis*. The declaration concludes as follows: "By means of the committing of the said several grievances by the said *Throgmorton*, she, the said *Susanna*, is greatly injured in her good name, fame, credit and reputation amongst her neighbors, and hath sustained damages to the amount of \$1,000, therefore they sue," &c. The defendant pleaded the general issue and the statute of limitations. Verdict and judgment for the plaintiffs.

[\*384] \*This judgment can not be supported. The action is brought by the husband and wife for a personal wrong to the wife, and the declaration should have concluded to their damage, and not to the damage only of the wife. It has been decided that if, in cases like the present, the declaration conclude to the damage of the husband instead of to the damage of the husband and wife, the conclusion is wrong, and the objection may be made in arrest of judgment. *Newton et ux. v. Hutter*, 2 Ld. Raym., 1208. The reason of this is that the damages will survive to the wife, if the husband die before they are received. 1 Selw. N. P., 232. If that be the law, it follows, *a fortiori*, that where, as in the present case, the action is by the husband and wife for the slander of the wife, and the declaration concludes to the damages of the wife alone, the judgment for the plaintiffs must be erroneous. *Davis* may, at any time during his life, receive the damages recovered in this action, and, should he survive his wife, and die without receiving them, they could be received by his personal representatives. The declaration should have alleged the damages to have been sustained by *Davis* as well as by his wife. That is not done, and the judgment for the plaintiffs must consequently be reversed.

*Per Curiam*.—The judgment is reversed, with costs.

*O. H. Smith*, for the plaintiff.

*G. H. Dur'n* and *J. Test, jun.*, for the defendants.

## Duignan v. Wyatt and Another.

## ELLIOTT and Others v. RAY, in Chancery.

BILL in chancery on a decree for a certain sum of money, rendered by a Court of chancery in the State of *Kentucky*, in a case in which the defendant appeared, and in which there was a trial on the merits.

*Held*, that the decree, whilst unreversed, unless it was fraudulent, or the Court rendering it had no jurisdiction, was conclusive evidence that the amount was due to the complainants at the time the decree was rendered.

## [\*385] \*DUIGNAN v. WYATT and Another.

INSTRUCTIONS TO JURY.—The refusing to give instructions to the jury, unless the record show them to be relevant to the issue can not be assigned for error.

NEW TRIAL.—A new trial will not be granted to a plaintiff on the affidavit of a witness that he had forgotten, until after the trial, to mention a material fact invalidating one of the pleas (a).

ERROR to the *Owen* Circuit Court.

M'KINNEY, J.—This is an action of debt, brought on a writing obligatory, by the assignee, against the makers. The defendants pleaded seven pleas, upon each of which there was an issue to the country, and a verdict in favour of the defendants. A motion for a new trial was overruled, and judgment rendered on the verdict.

During the trial the plaintiff moved the Court to instruct the jury “that ignorance of the law in relation to the contract between the payee and the defendants is no excuse or defense for them in this action, and that a mistake by the defendants,

(a) See *McQueen v. Stewart*, 7 Ind., 535.

in a matter of law, can not be pleaded by them as a defense." This instruction was refused. It is settled by numerous decisions that when instructions are refused by an inferior court, the record must show the relevancy or irrelevancy of such instructions to the case pending, to enable the appellate court to determine whether error was committed or not. In this case there were seven issues of fact submitted to the jury, and as, from the record, the instructions asked stand insulated and unconnected with either of the issues, we must regard them as embracing an abstract proposition of law, and, consequently, recognize the refusal of the Circuit Court as correct.

A second bill of exceptions, taken by the plaintiff to the refusal of the Court to grant a new trial, sets out the affidavit of *John Foster*, upon which the motion for a new trial seems to have been founded. In the affidavit, *Foster* states "he was a witness in the case, and that after full investigation, he forgot to mention, until after the trial, that *Christopher Wyatt* received from the administrator, or executor of decedent, the sum of forty-five dollars, as *Wyatt* informed him, which was to pay the store debt in one of the pleas mentioned."

[\*386] Upon this affidavit we can not \*say that the Circuit Court should have granted a new trial. It does not appear from the record by whom, the plaintiff or the defendants, this witness was introduced, nor is this very material. It appears that he was examined, but that he did not, until after the trial, recollect the admission of one of the defendants of the receipt of money, which he informed him was to be applied to the payment of the store debt in one of the pleas mentioned. Had this been recollected, and been considered by the Court as material, he could have been re-examined before the jury retired. An opportunity would then have been afforded for the correction of the omission. It is certainly too late after the verdict. We know of no case in which such an affidavit has induced the granting of a new trial.

We are therefore of opinion that the Circuit Court was correct in refusing to give the instruction asked, and also in refusing to grant a new trial.



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Johnson and Others v. Harris and Another.

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*Per Curiam*.—The judgment is affirmed, with costs.

*I. Naylor*, for the plaintiff.

*C. P. Hester*, for the defendants.

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HARTY v. THE STATE, in Error.

INDICTMENT. The first count, after stating that *A. B.* had committed larceny at, &c., on, &c., charged the defendant with then and there aiding and abetting *A. B.*, &c. The second count charged the defendant as an accessory to the larceny before the fact. Plea, not guilty. Verdict and judgment against the defendant.

*Held*, 1. That the want of an averment in the indictment that the principal had been convicted, was no ground for arresting the judgment. 2. That an accessory must be tried after the conviction of the principal, or be tried with him. 3. That if the record do not show but that the principal had been convicted before the trial of an accessory, there is no ground for the latter to object, in an appellate court, that there had been no such conviction.

The judgment was affirmed, with costs.

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[\*387] \*JOHNSON and Others v. HARRIS and Another.

CONGRESSIONAL TOWNSHIP A CORPORATION.—If a bond, payable “to the trustees or their successors in office,” be the property of a congressional township, the suit on it must be in the corporate name of the township (a).

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(a) See *Upton v. Starr*, 3 Ind., 508, and cases there cited.

ERROR to the *Owen* Circuit Court.

BLACKFORD, J.—This was an action of debt commenced in *October*, 1831. The declaration states that *John Johnson*, *Thomas Harvey*, and *Samuel Scott*, trustees of school township, number nine, in *Franklin* township, &c., complain of *Daniel Harris* and *Gabriel Johnson*, of a plea, &c. In describing the cause of action, the declaration states that the defendants, on the 27th of *November*, 1830, by their writing obligatory, promised to pay the trustees (meaning the plaintiffs), or their successors in office (meaning the successors in office of the plaintiffs), \$156, &c. The declaration then avers that the plaintiffs are the trustees to whom the note was made payable. The breach assigned is, that the money has not been paid to the plaintiffs. The obligation, as read on *oyer*, is as follows: "Six months after date, for value received, we promise to pay the trustees, or their successors in office, \$156.20, as witness our hands and seals. *Franklin* township, *November* 27, 1830. *Daniel Harris* [L. S.], *Gabriel Johnson* [L. S.]" The defendants demurred to the declaration; the demurrer was sustained; and judgment was rendered for the defendants.

The declaration describes the plaintiffs as the trustees of the township. It states that by the words, "trustees and their successors in office," inserted in the bond, were meant the plaintiffs and the successors in office of the plaintiffs. It states also that the plaintiffs are the trustees to whom the bond is payable. According to these allegations, the bond is not the property of the plaintiffs, *John Johnson*, *Thomas Harvey*, and *Samuel Scott*, trustees of the township; but it belongs to the township itself, of which the plaintiffs are alleged to be the trustees. This township is a corporate body. The act of incorporation says, "That each congressional township within this State, shall be a body politic and corporate, by the name and style of the 'Trustees of school township number [\*388] —;' and in its corporate \*name and capacity may sue and be sued," &c. *Rev. Code*, 1831, p. 463.

As the bond belongs to the township, and as the township is competent to sue, this action should have been brought in the

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Phillips and Another v. Bradbury and Another.

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corporate name of the township. The money due to a corporation may be received and receipted for by its authorized agent; but it can only be sued for in the name of the corporation. The present suit is not in that name. The plaintiffs here are, *John Johnson*, *Thomas Harvey*, and *Samuel Scott*, trustees of school township number nine. That is not the name of the corporation. Its name is simply, "Trustees of school township number nine." Suppose the corporate name had continued to be what it was under the act of 1824, viz., "Township number nine, range —," it is obvious that *A*, *B*, and *C*, trustees of school township, &c., could not be recognized as the name of the corporation. The circumstance, that the corporate name, instead of being "township number nine," is "trustees of school township number nine," can make no difference. *A*, *B*, and *C*, trustees of the township, is no more the name of the corporation in the one case than it would have been in the other.

The declaration before us shows that the money, for the recovery of which the action is brought, is due to a congressional township; but that the action is not brought in the corporate name of the township. The declaration is therefore bad, and the demurrer to it was correctly sustained by the Circuit Court.

*Per Curiam*.—The judgment is affirmed with cost.

*I. Naylor*, for the plaintiffs.

*C. P. Hester*, for the defendants.

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PHILLIPS and Another v. BRADBURY and Another.

SALE—PLEADING—WARRANTY—FRAUD.—To an action on a promissory note, the defendant pleaded in bar as to part of the amount that the consideration of that part was goods sold and delivered at a sound price, as good and salable goods, which goods were damaged and of little or no value. *Held*, that the plea—containing no averment either of fraud or warranty—was insufficient (*a*).

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(*a*). See *The President, &c.*, v. *Wadleigh*, 6 Blackf., 297.

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Phillips and Another v. Bradbury and Another.

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APPEAL from the *Rush* Circuit Court. In this case, *Bradbury* and another were the plaintiffs below, and *Phillips* and another the defendants.

[\*389] \*M'KINNEY, J.—This is an action of debt brought on a promissory note. The defendants below, on *oyer* of the note pleaded *actio non* to all the amount in the declaration mentioned, except the sum of \$700, because they say that the consideration for which the said note was made and executed was a bill of store goods consisting of an invoice of broad cloth supposed to be worth \$200, an invoice of cassinet supposed to be worth \$200, and an invoice of calico and domestic cotton supposed to be worth \$300, together with other goods amounting to the residue of the said note, at that time furnished and advanced by the plaintiffs, as merchants and dealers in goods of that kind, to the said defendants; and the said defendants aver that they purchased the said \$200 supposed worth of cloth, and the said \$200 supposed worth of cassinet, and the said \$300 supposed worth of calico and domestic cotton, of the said plaintiffs as and for good, sound and salable goods, and at a sound price, when, in truth and in fact, the defendants say that the said goods, to wit, the said \$200 invoice of cloth, the said \$200 invoice of cassinet, and the said \$300 invoice of calico and domestic cotton, were included in said note as \$700 of the consideration of said note, and were rotten, damaged, and of little or no value, and this they are ready to verify, &c.

The plaintiffs prayed judgment of the part unanswered by the plea, and as to the residue, demurred specially, assigning the following causes: 1. The plea does not answer all it assumes to answer; 2. There is neither a warranty of the goods, nor a knowledge on the part of the plaintiffs of any defect in them alleged in the plea; 3. The plea says the goods were of little or no value, but of how little value is not stated. On joinder the demurrer was sustained, and judgment rendered for the plaintiffs.

The second objection to the pleas sustains the judgment of the Circuit Court. The law is well settled that unless there be an express warranty or fraud in the sale of a personal chattel,



## White v. Lloyd and Another, on Appeal.

the vendor is not liable for defects of any kind. In a note to the case of *Parkinson v. Lee*, 2 East, 314, the authorities upon this point are collected, and it is unnecessary to advert particularly to them. The plea does not allege a warranty, nor does it charge fraud. The only ground for its support would appear to be the rule of the civil law, that a sale for a [\*390] \*sound price implies a warranty of soundness in the thing sold. This rule of the civil law has been adopted in some States of the *Union*. We, however, must regard the common law, and its exposition upon this point, as our guide (1).

The plea, exclusive of this objection, is otherwise radically defective.

*Per Curiam*.—The judgment is affirmed, with three *per cent.* damages and costs.

*J. Rariden*, for the appellants.

*O. H. Smith*, for the appellees.

(1) Vide *Wynn et al. v. Hiday*, Vol. 2 of these Rep., 123.

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WHITE v. LLOYD and Another, on Appeal.

REPLEVIN. Plea, property in one of the defendants. Verdict as follows: "We, the jury, find for the defendants, and that they have a return of their property in their plea mentioned." Judgment in favour of the defendants for a return of the property, and for costs. The plaintiff appeals.

*Held*, that, in replevin, if the defendant claim property and obtain a verdict, as in the present case, he is entitled to a return of the goods, but not to damages; that the defendant in replevin was, in no case, entitled to damages by the common law, and that the statutes of 7 *Hen.*, 8, and 21 *Hen.* 8, giving the defendant in replevin damages in certain cases, do not apply to a case where the defendant pleads property in the goods. *Hopewell v. Price*, 2 Harr. & Gill, 275.

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Mitchell et al. v. The State, on the relation of the Board of Trustees, &c.

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*Held*, also, that though a defendant in replevin, claiming property, is not entitled to costs by the common law, nor by the *English* statutes on the subject, yet, by the statute law of this State, he is entitled to costs when he obtains a verdict in such a case in replevin, as in all other cases. *Hiday et al. v. Gilmore*, in this Court, *May* term, 1832 (1).

The judgment was affirmed, with costs.

(1) *Ante*, p. 48.

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[\*391] \*MITCHELL et al. v. THE STATE, on relation of the Board of Trustees of the *Union* County Seminary.

TRUSTEE OF COUNTY SEMINARY—LIABILITY TO SUCCESSOR.—A suit for the benefit of the board of trustees of a county seminary will not lie against their predecessor in office, for the money in his hands collected in the county of persons conscientiously scrupulous of bearing arms, as an equivalent for militia duty, the seminary not being entitled to the money.

ERROR to the *Union* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by the State, on the relation of the board of trustees of the *Union* county seminary, against *Mitchell* and his sureties, on a penal bond, conditioned for *Mitchell's* faithful discharge of the duties of his office as trustee of the seminary fund of *Union* county, and for the payment of all moneys, and the delivery of all books, which he might have in his hands as trustee, to his successors in office, when his term should expire. The declaration states that large sums of money belonging to the county seminary, came into *Mitchell's* possession as seminary trustee, which he refuses to pay over to the relators, who are his successors in office. Whereby an action has accrued, &c. The defendants pleaded five pleas in bar of the action. To the first plea, there was a replication and issue. The second was demurred to, and the demurrer sustained. On the others, issues

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Mitchell et al. v. The State, on the relation of the Board of Trustees, &c.

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were joined. A jury was dispensed with, and the cause submitted to the Court. The Court, after hearing the evidence, rendered a judgment in favour of the plaintiff for \$355.17, together with costs.

By a bill of exceptions taken by the defendants below, it appears "that the only money or funds that were in the hands of the defendant (*Mitchell*), at the time the suit was brought, were \$357, to which the relators had any color of claim, which money was assessed and collected of persons conscientiously scrupulous of bearing arms in the county of *Union*, as an equivalent for military services."

The only question presented by this case, which it is necessary to notice, is, whether the relators were legally entitled to the money mentioned in the bill of exceptions?

This is a question very easily decided. The constitution of \*the State says, that "[\*392] "the money which shall be paid as an equivalent, by persons exempt from militia duty, except in times of war, shall be exclusively, and in equal proportion, applied to the support of county seminaries; also, all fines assessed for any breach of the penal laws, shall be applied to said seminaries, in the counties wherein they shall be assessed." Const., Art. 9, sec. 3. It is evident, from this language of the constitution, that the money mentioned in the bill of exceptions, as in the hands of the defendant *Mitchell*, does not belong to the *Union* county seminary. It is money which was paid as an equivalent for militia duty, and should have been paid by the collector into the State treasury, to be afterwards apportioned with other similar funds among the county seminaries of the State.

It would be useless to inquire, on the present occasion, to whom *Mitchell* is accountable at law for the money in question, provided no right can be set up to it by the relators. No action can be supported for the recovery of money, unless the plaintiff can show himself legally entitled to it. There could be no breach of duty in *Mitchell*, for refusing to pay over to his successors in office any money in his possession which does not

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Ward and Another v. Crane and Another.

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belong to the seminary. His bond, upon which the action is founded, does not require it.

The judgment of the Circuit Court, upon the evidence before it, should have been in favour of the defendants in that Court.

*Per Curiam*.—The judgment is reversed at the costs of the relators. Cause remanded, &c.

*O. H. Smith*, for the plaintiffs.

*J. Perry*, for the State.

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BUTLER and Another v. SKOMP, in Error.

AN appeal from the judgment of a justice of the peace to the Circuit Court will be dismissed, if the transcript of the justice's proceedings be not filed in the clerk's office, within twenty days after the filing of the appeal-bond with the justice. *Brown v. Modisett*, ante, p. 381.

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[\*393] \*WARD and Another v. CRANE and Another.

**FORCIBLE ENTRY AND DETAINER.**—Though a person who has had quiet possession of an estate for three years, and whose interest remains undetermined, is protected by statute from the action of forcible entry and detainer, yet the declaration in this action need not deny the existence of such a possession, or the continuance of the estate.

**PRESUMPTION.**—An appellate Court must presume, the record showing nothing to the contrary, that the evidence in the Court below was sufficient to authorize the judgment.

**PRACTICE.**—The circumstance that the forcible entry and detainer complained of appears, by the declaration, to have been committed beyond the time limited by the statute, is no cause for arresting or reversing the judgment for the plaintiff.



## Ward and Another v. Crane and Another.

CONVEYANCE OF INTESTATE'S REAL ESTATE.—A conveyance of the real estate of an intestate by his administrator, and by his widow as the guardian of his children, is not valid unless the grantors had some special authority for making it.

VERDICT.—In an action of forcible entry and detainer, the verdict for the plaintiff in the Circuit Court, on appeal, must be signed by all the jurors.

ERROR to the *Jackson* Circuit Court.

BLACKFORD, J.—On the 4th of *August*, 1832, two justices of the peace filed in the clerk's office of the Circuit Court a transcript of certain proceedings which had taken place before them in an action of forcible entry and detainer. The suit was commenced by *Phebe Ann Crane* and *Emeline Crane*, minors, by their next friend, against *John Ward* and *Ebenezer Douglass*. The complaint was that on the — day of —, 1829, the defendants, with force and arms, at, &c., made an unlawful and a forcible entry into a tract of land, which is particularly described, and expelled the complainants out of said land, and with strong hand possess the same, and deforce the said complainants therefrom, and still keep them out of the possession thereof. There was a trial before the justices on the 5th of *July*, 1832, and a verdict and judgment rendered for the defendants. The plaintiffs appealed to the Circuit Court. The defendants pleaded not guilty. Verdict and judgment in the Circuit Court for the plaintiffs.

The first error assigned is that the record does not show but that the defendants had been in quiet possession for three years next before the bringing of the action. This objection is founded on the clause in the act respecting forcible entries and detainers, which enacts that the law shall not extend to any person who has had the occupancy, or been in quiet possession of the premises for three years next before suit [\*394] brought, \*and whose estate therein is not determined.

R. C., 1831, p. 268. There is no ground for this objection. It is true that it does not appear on the face of the complaint that the defendants had not been in possession for three years; nor was it necessary that that fact should appear in the complaint. Had the defendants wished to avail them-

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Ward and Another v. Crane and Another.

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selves of the limitation in the statute, they should have specially pleaded their quiet possession for the time prescribed, and the continuance of their estate. Supposing, however, that the plaintiffs were bound, under the general issue, to prove the entry or detainer charged to have taken place within three years, yet the record does not show but that such proof was given. If the evidence was necessary to support the action, we must presume, the contrary not appearing, that it was given. The idea that the day on which the offense was committed should appear by the complaint to have been within three years before suit brought, is erroneous: The day in this case, as in declarations in trespass, is immaterial. The plaintiff, in his proof, is not confined to the time laid. He may show that the offense was committed at a period long subsequent to that stated in the complaint. Consequently, the circumstance of the offense appearing, by the declaration, to have been committed before the limited time, is no cause for arresting or reversing the judgment. 2 Saund. R., 63, a note.

The second objection is that the transcript of the proceedings before the justices was filed in the clerk's office of the Circuit Court, on the 4th of *August*, 1832, but that no notice was taken of the cause until the *March* term, 1833, notwithstanding there had been a term of the Court in *September*, 1832. In answer to this, it is only necessary to observe that the defect in the record as to this point has, on a suggestion of diminution, been supplied. An amendment to the record has been sent up, which shows that, at the *September* term, 1832, the cause was on the docket, and was continued.

The third ground relied on is that a deed executed by *Griffith* and *Mrs. Crane*, which was offered in evidence by the defendants below, and rejected, should have been admitted. That deed shows on its face that the land in question was the property of *Jabez Crane*, the plaintiffs' father, at the time of his decease. It is intended, among other things, as a conveyance of the land by *Griffith*, as administrator of *Crane's* estate, and by *Mrs. Crane*, as the guardian of his

[\*395] children, to *John Ward*, \*one of the defendants, and

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to *Asa Crane*. This deed could not affect the title of the plaintiffs unless the administrator or guardian had some special authority for making it. No such authority is shown. It is contended, however, that this deed of the administrator and guardian was admissible to prove the nature of the defendants' entry and possession. But, assuming that to be the case, there is nothing to show either that *Griffith* was the administrator, or Mrs. *Crane* the guardian, as they have thought proper to call themselves. Without proof of the character assumed by the grantors, the deed was, at all events, inadmissible as evidence, and, as the record is silent on the subject, we are bound to presume, if the presumption be necessary to support the judgment, that no such proof was given.

There is one other error assigned. It is this, that the verdict is not signed by all the jurors. This objection is fatal. The question was decided by this Court in the case of *Test v. Devers*, November term, 1827, under the statute of 1824 (1). We adhere to that decision. The statute of 1831, under which the present case occurred, is the same with that of 1824. The judgment, on this last ground, relied on by the plaintiffs in error, is erroneous.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*H. P. Thornton* and *J. H. Farnham*, for the plaintiffs.

*C. Dewey* and *A. C. Griffith*, for the defendants.

(1) Vol. 2 of these Rep., 80

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### JACOBS v. MOFFATT.

ARBITRATION AND AWARD—OBJECTIONS TO.—The parties to a reference agreed on the day for the meeting of the arbitrators, and met with the arbitrators on that day, when the examination was commenced and adjourned until the next day, when the award was made. Held, that the

Jacobs v. Moffatt,

party dissatisfied with the award could not object to it on account of his not having had a written notice of the time of the meeting of the arbitra'ors. *Held*, also, that such party having, by an endorsement on the arbitration-bond, agreed that a change should be made as to one of the arbitrators, could not afterwards object to the award in consequence of its being made in conformity with that agreement.

[\*396] \*SAME.—An award can not be objected to, because the submission and award were not recorded, before the granting of the rule to show cause why the award should not be made the judgment of the Court, nor because ten days' notice of the rule had not been given, if the rule was entered by *the consent of the parties*.

SAME—RECORD.—The record of the judgment on an award need not show that the arbitrators were sworn, nor that the arbitration-bond was proved, nor that the witnesses were sworn, nor that the award was proved: an appellate court will presume, the record not showing the contrary, that the law, as to these matters, was complied with.

SAME.—*Quære*, whether the arbitrators, appointed under the act for the regulation of arbitrations in the Circuit Court, should be sworn?

SAME—PRACTICE.—If the objection to an award, on account of its not having been made or returned in due time, be not made in the Court below, it can not be noticed by an appellate court (a).

COSTS.—The arbitrators should state in their award the costs of the witnesses examined before them, and the amount due for their own services.

SAME.—An award as to the costs should distinctly show whether or not it applies to the costs in the Circuit Court (b).

ERROR to the *Posey* Circuit Court.

BLACKFORD, J.—*Adam Moffatt* and *Daniel R. Jacobs*, by a writing obligatory, dated the 15th of May, 1832, agreed to submit certain matters in difference between them to arbitration. The arbitrators named in the agreement were *Daniel Astor* and *James E. Rogers*. The award was to be made a rule of the *Posey* Circuit Court, at the *August* term, 1832. On this writing obligatory there was endorsed an agreement, under the hands and seals of the parties, that the arbitrators should meet on the 28th of May, 1832. There was also another agreement, under the hands and seals of the parties, endorsed on the writing obligatory, by which it was agreed that *Asa Bacon* should be one of the arbitrators, instead of *Daniel Astor*. On the seventh day of the *August* term, 1832, of the *Posey*

(a) *Ellison v. Chapman*, 7 Blackf., 224.

(b) *Hamilton v. Wort*, Id., 348.



Circuit Court, the following award was filed in the clerk's office:

"Know all men that *J. E. Rogers* and *Asa Bacon*, having been chosen by and with consent of *Adam Moffatt* and *Daniel R. Jacobs*, the contending parties, as arbitrators to settle matters and controversies between them, as expressed in a bond now in our possession, having fully investigated all and singular their accounts, papers and books, and having examined and heard all the evidence on both sides, do finally award and consider that *Daniel R. Jacobs* pay to *Adam Moffatt* the sum of \$231, and each party to pay half the costs. And [\*397] this is our final award and decision. Signed, sealed, and to be delivered. *Mount Vernon*, 29th *May*, 1832. *J. E. Rogers*, [L. S.] *Asa Bacon*, [L. S.]"

On the same day on which the award was filed, the Court ordered, on motion of the plaintiff below and *by consent of the parties*, that the defendant should show cause at the next term, why the award should not be made a rule of Court. At the next term, which was in *February*, 1833, the parties appeared. The defendant below objected to the award on two grounds. First, because no written notice of the meeting of the arbitrators was proved to have been given, except that endorsed on the arbitration-bond by the parties. But it was proved that by agreement and previous arrangement between the parties, the arbitrators and parties met on the 28th of *May*, 1832, and proceeded to examine the evidence on both sides relative to the matters submitted, and that they continued the investigation until the next day; on which day the award was made, and copies thereof were immediately delivered to each of the parties. The second objection was, because it did not appear on the face of the papers, that the award of *Asa Bacon* should be made a rule of court. These objections were both overruled, and judgment was rendered that the award should be made a rule of court, and that *Moffatt* should recover against *Jacobs* the sum of \$231, the amount awarded, with interest till paid; and it was ordered that each party should pay one-half the costs.

The first objection made in the Circuit Court to the award, is without foundation. The parties agreed in writing that the arbitrators should meet on the 28th of *May*, 1832. The record shows that, on that day, the arbitrators and parties all met, commenced the examination of the cause, and continued the examination until the next day, when the award was made. It could not, under these circumstances, be objected to the award, that the defendant received no written notice of the meeting of the arbitrators. The second objection is equally untenable. The parties endorsed, on their arbitration-bond, their agreement that *Bacon* should be one of the arbitrators instead of *Astor*; and that the original covenants and agreements should remain the same. This agreement puts an end to the second objection. These two objections were the only ones made, in the Circuit Court, to the award. They were correctly overruled.

[\*398] \*The assignment of errors contains several other objections to the proceedings.

It is objected that it does not appear that the submission was entered of record, before the rule to show cause was granted. The statute requires the submission *or* award to be recorded. It may be observed, in passing, that the words "submission *or* award" must be intended to mean, submission *and* award. The latter are the words of the original act. R. C. 1807, p. 177. The sentence, without this correction, is unintelligible. It is true, that the submission and award should be recorded before the rule to show cause is granted; and if they be not, the omission would be a good objection to the granting of the rule. In the present case, however, the record shows that the rule was entered *by the consent of parties*. This consent excludes any objection which might, otherwise, have been made to granting the rule.

It is further objected, that ten days' notice of the rule was not given to the defendant. The rule entered was, that the defendant should show cause, at the next term, why the award should not be made a *rule* of court. The word *rule* last used, is evidently intended for the word *judgment*, and must be so

understood. We have already observed, that this rule to show cause was entered *by the consent of the defendant*. No purpose, therefore, could have been answered by giving him a formal notice of it. His right to the notice was waived by his consent to the rule.

It is further objected that the record does not show that the arbitrators were sworn; nor that the arbitration-bond was proved; nor that the witnesses were sworn; nor that the award was proved. The record does not, indeed, say any thing as to these facts. It is not necessary that it should. The Circuit Court has rendered a judgment on the award; and we must presume, until the contrary is shown, that, as to these grounds of objection, the law was complied with. Whether the arbitrators in this case should have been sworn, we give no opinion. The act respecting justices of the peace requires, in cases before them, that the arbitrators should be sworn. Rev. Code, 1831, pp. 303, 304. But the act for the regulation of arbitrations in the Circuit Court, like the *English* act of 9 and 10 Will. 3, contains no such provision. R. C. 1831, p. 72 (1). Assuming,

for argument's sake, that the oath was necessary, [\*399] \*the objection that it was not taken should have been made in the court below. There was no other way to get the objection on the record; for however necessary the oath may be, the award need not show it to have been taken. In *Kentucky*, the oath is required by statute; and it has been there decided, that the award must show on its face that the arbitrators were sworn. The courts of that State have, however, frequently regretted the decision, and intimated that, were the question a new one, their decision would be otherwise. *Lile v. Barnett*, 2 Bibb, 166; *French v. Moseley*, 1 Littell, 247. The question is a new one here, and we have no hesitation in deciding that, admitting the necessity of the oath, it is not necessary that the award should state that it had been administered.

It is further objected, that there is no time specified in the agreement, within which the award was to be made. The agreement states that the *award* should be made a rule of the

*Posey* Circuit Court, at the then next *August* term. By this was probably meant, that the *submission* should, at that term, be made a rule of the Court. If so, the agreement does not state when the award should be made. The only effect of this omission in the agreement was, that if the arbitrators did not proceed to act within a reasonable time on the request of either of the parties, the party making the request could revoke the submission. *Curtis v. Potts*, 3 Maule & Selw., 145. In this case, the award was made within a reasonable time. The agreement to submit was executed on the 15th of *May*, 1832; and it was a part of the agreement that the arbitrators should meet on the 28th of the same month. The bill of exceptions, taken by the defendant below, shows that the arbitrators did meet on the day thus appointed; and that, on the next day, they made their award, and delivered copies to the parties. There was no neglect, therefore, on the part of the arbitrators; and it can not be said that the award was not made within the proper time. But even supposing the award not to have been made at a proper time, the objection to it on that ground should have been made in the Circuit Court. It is too late to make it here for the first time.

It is also objected, that the award was not returned in due time. It was filed in the clerk's office on the seventh day of the *August* term, 1832, which was the first term after the agreement to submit was made. The defendant appeared [\*400] to the \*rule to show cause why the award should not be made the judgment of the Court. He showed cause by making two objections to the proceedings, which were both correctly overruled. But he made no objection then that the award had not been returned in time; and it is too late, therefore, to make it now. It is not necessary, under these circumstances, to examine the merits of the objection.

The last objection made is, that the costs were not taxed by the arbitrators. The judgment of the Circuit Court is, that the plaintiff recover of the defendant the sum of \$231, the amount awarded to the plaintiff, with interest till paid. There is also an order of the Court that the parties each pay one-



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Alloway v. Sibert, on Appeal.

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half of the costs. It was the duty of the arbitrators to state, in their award, the costs of the witnesses examined before them, and the amount due for their own services. That these expenses should be stated in the award, to enable the Court to make an order respecting them, is expressly required by the act of 1807, and is in accordance with the spirit of the act of 1831. The award before us does not show the amount of these costs, and the order respecting them can not be supported. The order, so far as it may be supposed to extend to the costs in the Circuit Court, is also erroneous. The award does not show whether the arbitrators intended that their award should extend to the costs in the Circuit Court, or should be confined to the costs which had accrued before themselves. In consequence of this uncertainty in the award as to the costs in the Circuit Court, no order founded on the award could be made respecting them.

All the errors assigned in this cause have now been noticed. There is no error in the judgment of the Circuit Court against the plaintiff in error, for the amount found by the arbitrators to be due from him to the defendant in error. But the order for costs is erroneous, and must be reversed.

*Per Curiam.*—The judgment as to the debt, &c., is affirmed, and as to the costs, &c., reversed.

*C. Fletcher*, for the plaintiff.

*E. Embree* and *W. Quarles*, for the defendant.

(1) Vide *Dickerson v. Hays*, May term, 1835, post.

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[\*401]      \*ALLOWAY v. SIBERT, on Appeal.

DEBT on three promissory notes dated in *August*, 1821: the first payable two years after date, the second three years after date, and the third four years after date. Plea, that the notes were given in part consideration of certain town lots in

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Wernwag et al. v. Mothershead et al., in Error.

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*Westport, Oldham* county, State of *Kentucky*; that at the time the notes were given, the plaintiff executed to the defendant a title-bond, conditioned for the conveyance of the lots to the defendant, on the payment of the note last to fall due; that the plaintiff never had any title to the lots, and never made any to the defendant; and that, therefore, the consideration of the notes had failed. Replication, that the consideration had not failed in manner and form, &c.

It was proved, on the trial, that there was no deed of conveyance for the lots to the plaintiff recorded in the clerk's office of *Henry* county, State of *Kentucky*; but it did not appear that the records of that office furnished any evidence as to the title of real estate in the county of *Oldham* aforesaid, in which the lots in question were situate. It was also proved that the defendant had been in possession of the premises ever since the date of the notes, without any interruption except as to some small part, and as to that part, it did not appear that the interruption was in consequence of any legal claim.

*Held*, that the plea was not sustained by the evidence, and that the plaintiff was entitled to judgment.

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WERNWAG et al. v. MOTHERSHEAD et al., in Error.

DEBT on a promissory note given by the plaintiffs in error to the defendants in error as follows: "\$432. Eight weeks from date we will pay *Mothershead* and *Foster* four hundred and thirty-two dollars, and, if not paid when due, we will pay five dollars interest per week until paid. *December 11th, 1832.*"

[\*402] \*The declaration described the note correctly, and concluded as follows: "And although the said sum of money specified in the said note hath, according to the tenor and effect thereof, long since been due and payable, nevertheless

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Wernwag et al. v. Mothershead et al., in Error.

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the said defendants, though often requested, &c., have not paid the same, or any part thereof, to the plaintiffs, but have hitherto wholly neglected and refused to pay the same. Wherefore, &c. Damage, \$300."

*Held*, on demurrer, that the assignment of the breach in the declaration was sufficient to authorize a recovery not only of the principal debt, but also of the interest due on the note, a special averment of the non-payment of the interest not being essential to a recovery of the interest.

*Held*, also, that the promissory note in question, on default of payment when due, drew interest at the rate specified in the note from the time it became due, and not from the date of the note (1).

(1) *Vide Tyler et al. v. Denson*, ante, p. 347, and note (2).

END OF MAY TERM, 1834.





[\*403]

# \*CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1834, IN THE NINETEENTH YEAR OF THE STATE.

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SHIRKEY v. HANNA and Another.

**JOINT MORTGAGE—FORECLOSURE.**—A joint mortgage to two persons to secure debts due to them severally, may be foreclosed on a joint bill filed by the mortgagees.

**SAME—DECREE.**—It is no objection to a decree for the complainants in such a case that all the land mortgaged is ordered to be sold.

ERROR to the *Union Circuit Court*.

M'KINNEY, J.—This is a suit in chancery, brought by *Hanna* and *Harlan*, to foreclose a mortgage executed to them by *Shirkey*.

The bill, in substance, states that *Shirkey*, being indebted to the complainants in the sum of \$1,161.82, on the 26th day of *November*, 1832, executed a note, under seal, to *Samuel Hanna*, for \$506.85, payable on or before the 1st day *August*, 1833, with interest at the rate of twelve *per cent. per annum* until paid; and that he also executed another sealed note to *John Harlan* on the same day, and payable at the same time, for

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Shirkey v. Hanna and Another.

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\$654.97, and bearing the same rate of interest; that [\*404] *Shirkey*, being seized in fee \*simple of the north-west quarter of section 19, township 19, range 14, except, &c., situate and being in *Union* county, on the 26th day of *November*, 1832, to secure to the complainants the payment of the said sum of \$1,161.82, by deed of mortgage between the said *Shirkey* of the first part, and the said complainants of the second part, in consideration of the said sum, conveyed to the complainants the said land. The bill further charges that the said sums of money have long since become due and payable, but remain unpaid. Prayer, that *Shirkey* and his heirs may be foreclosed of the equity of redemption, &c., and that the land may be sold, &c.

The defendant demurred to the bill on the ground that a joint bill could not be maintained, the interests of the mortgagees being several. The demurrer was overruled, and on the defendant's refusal to answer, a decree was rendered in favour of the complainants.

The decree is complained of: 1st. Because the Circuit Court overruled the demurrer to the bill; 2d. Because it directs the sale of all the land mortgaged. We apprehend that, on examination, neither of the objections to the bill will be found tenable.

The rule of law is certainly indisputable, as assumed, that if a man covenant with two or more jointly, yet if the interest and cause of action be several, the covenant shall be taken to be several, though the words of the covenant be joint. But we do not think that that rule applies to the case before us. The debts of the complainants were unquestionably several, and several suits must have been brought at law if, exclusive of the security afforded for payment by the land mortgaged, they had looked to other means possessed by their debtor for payment. The debts, though several, were secured by land mortgaged to them jointly, and it would seem that their interest in such security being joint, they could only have proceeded as they have done, by joining in the bill to foreclose. The cases of *Lowe v. Morgan*, 1 Bro. Ch. Cas., 368, and

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*Palmer v. Carlisle*, 1 Sim. & Stu., 423, are accordant with this view. The latter was a bill to foreclose, brought by one of two mortgagees, each having lent a certain sum on the mortgage, and it was held that there could be no foreclosure or redemption, unless the parties entitled to the whole mortgage-money were before the Court. Other adjudications [\*405] go as far. Without dwelling upon the reasons that sustain this principle, we are satisfied that the demurrer was correctly overruled.

The second objection is without weight. Sales of land mortgaged are, by statute, to be governed as sales of land under executions from the common law side of the Circuit Courts. There is no conflict with this statutory requirement by the decree.

*Per Curiam*.—The decree is affirmed, with two *per cent.* damages and costs.

*J. Rariden*, for the plaintiff.

*J. Perry*, for the defendants.

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ARCHER v. SPENCER.

**PROMISSORY NOTE—DECLARATION OF ASSIGNEE.**—In an action on a promissory note brought by an assignee, the declaration should state the assignment to be made on the note, under the hand of the assignor.

ERROR to the *Allen* Circuit Court.

STEVENS, J.—*Spencer* declared against *Archer* in debt. The averments of the declaration necessary to be noticed are, that on, &c., at, &c., *Archer* made his due bill in writing, &c., by which he promised to pay one *Edsall* \$198.72, &c.; that afterwards, on, &c., at, &c., and before said money was paid, *Edsall* “assigned said due bill to said *Spencer*, and then and there, by said assignment, transferred and appointed said sum of money in said due bill specified, to be paid to the said *Spencer*, and then and there delivered the said due bill, so assigned as

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aforesaid, to said *Spencer*," &c. The defendant demurred. The demurrer was overruled, and judgment rendered for the plaintiff.

The objection raised is, that *Spencer* is not legally entitled to bring a suit on the above instrument in his own name, under the assignment which appears of record, neither at common law nor under our statute. At common law, the due bill in question is not negotiable, and no assignment of it could transfer the legal interest to the assignee. It would only vest in him an equitable interest, and he would have to bring suit

in the name of the original payee, for his use, &c. [\*406] Under our \*statute such instruments of writing are made negotiable, and the assignee can maintain a suit in his own name, if they are transferred in a particular way and manner. The words of the statute are, "Shall be, and the same are hereby made assignable, by endorsement thereon, under the hand or hands of such person or persons to whom the same shall or may be made due or payable, &c., and such assignee or assignees may bring suit thereon in his, her, or their own name or names," &c. The statute expressly requires the assignment to be on the instrument itself, and under the hand of the payee, and not in any other way or manner.

It is a principle which is, perhaps, well settled, that when a new right is introduced by statute, the party claiming under it is confined to the provisions of the statute, unless the right existed at common law, and the new right given by the statute is cumulative only. The right claimed and exerted by the plaintiff in the Court below, in this case, does not exist at common law; it is purely statutory, and the party claiming under it must bring himself within the statute. This he has not done. His declaration should have shown that the assignment was upon the instrument itself, and that it was under the hand of the payee who was the assignor: these averments are material, and being omitted, the plaintiff must fail.

*Per Curiam*—The judgment is reversed, with costs.

*H. Cooper*, for the plaintiff.

*G. H. Dunn* and *D. H. Colerick*, for the defendant.



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Lewis v. Hoover.

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**DOWDEL and Another v. ASTON and Another.**

**PLEADING.**—The statute of 1833, dispensing with a declaration in certain cases, does not apply to an action on a note under seal for the payment of money.

**ERROR** to the *Parke* Circuit Court.

**BLACKFORD, J.**—This was an action by *Aston* and *Coffin* against *Dowdel* and *Nugent*. The plaintiffs, instead of filing a declaration, merely filed a note, under seal, for the payment of a certain sum of money as the cause of action. Upon the calling of the cause, the defendants moved the Court [\*407] to dismiss \*it for the want of a declaration. The Court overruled the motion, and gave judgment for the plaintiffs below.

The only question in this cause is, whether it is necessary, under the statute of 1833, to file a declaration in an action on a writing under seal for the payment of money? It appears to us that the statute must be confined in its operation to promissory notes; that is, notes not under seal. The statute, in the commencement, speaks of bills or notes; but in a subsequent clause, the meaning is restrained by the reference to promissory notes alone. The remedy is a new one, unknown to the common law, and the statute can not claim a liberal construction. *Bac. Abr.*, tit. Statute. The judgment must be reversed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, with leave to file a declaration, &c.

*C. P. Hester*, for the plaintiffs.

*A. S. White*, for the defendants.

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**LEWIS v. HOOVER.**

**ASSAULT AND BATTERY—EVIDENCE—DAMAGES.**—The plaintiff may recover, in trespass for an assault and battery, on proof of an assault, without any evidence of special damage.

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**ERROR to the Allen Circuit Court.**

STEVENS, J.—Trespass, assault and battery. Plea, not guilty. Jury trial, verdict and judgment for the defendant. It appears of record in this case, by a bill of exceptions, that during the trial of the cause, after the parties had closed their evidence and arguments to the jury, and before the jury had retired, the plaintiff asked the Court to charge the jury that if they thought from the evidence, the defendant struck at the plaintiff with a stick, in a violent and angry manner, within striking distance of him, they ought to find for the plaintiff; which charge the Court gave, but added as an additional charge, that if no damage was proved to have resulted from the said assault, they ought to find for the defendant. To this additional and latter charge the plaintiff excepted, and prosecuted this writ of error.

The only question to be determined is, whether that latter and additional charge of the Court was correct?

[\*408] \*An assault is an attempt or offer with violence to do a corporal hurt to another, as if one lift up his cane or fist at another in a threatening manner, or strike at him with a stick, his fist, or any weapon, within striking distance, but miss him. This is called an unlawful setting upon one's person, and is an inchoate violence for which the party assaulted may have redress by an action of *trespass vi et armis*, and shall recover damages as a compensation, although no actual suffering or injury is proved. The damages are not assessed for the mere corporal injury or pecuniary loss, but for the malicious and insulting conduct of the defendant. 3 Bl. Comm., 120; 1 Bac. Abr., 242; 1 Saund. on Pl. & Ev., 103, 104. From this it appears that the above additional and latter charge of the Circuit Court to the jury is incorrect, and should not have been given.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

D. H. Colerick, for the defendant.

Hays v. Allen.

## HAYS v. ALLEN.

**SLANDER—POSTMASTER EMBEZZLING LETTERS.**—Words charging the plaintiff as postmaster, with taking money out of a letter put into the office by the defendant, and appropriating it to his own use, with keeping and embezzling letters, &c., are actionable.

**SAME.**—Such slanderous words, assuming that the plaintiff possessed the character in which he was defamed, operate as an admission, and are *prima facie* evidence of the fact.

**SAME—EVIDENCE.**—Though the declaration in this case not only stated that the plaintiff was a postmaster, appointed and commissioned by the postmaster general, but also that he had given bond and been sworn into office, it was held that his character of postmaster, if evidence of it could be required, was sufficiently established by proof of his commission, and of his acting in that capacity (*a*).

ERROR to the *Morgan* Circuit Court.

M'KINNEY, J.—This is an action of slander brought by *Allen* against *Hays*. The declaration contains the prefatory allegation that the plaintiff was a postmaster at *Port Royal*, *Morgan* county, appointed and commissioned by the postmaster general of the *United States*, and as such had given  
[\*409] bond and taken the \*oath of office, as required by law.

The words alleged to have been spoken are embraced in one count, and charge the plaintiff, as postmaster, with the crime of taking a letter out of the post office at *Port Royal*, in which the defendant had enclosed a certain sum of money directed to a merchant in *Cincinnati*, and appropriating the money to his own use, with keeping letters sent to the office to be mailed, embezzling letters, &c. It also contains the further charge, "*David Allen* is a thief." A special demurrer was filed to the declaration, objecting to all the words charged except the last. The demurrer was overruled, and a trial had on the plea of not guilty. The jury returned a verdict in favour of the plaintiff, and, after overruling a motion for a new trial, made by the defendant, the Circuit Court rendered judgment on the verdict.

(a) See *Hesler v. Degant*, 3 Ind., 501; *Rodebaugh v. Hollingsworth*, 6 Id., 339.

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The judgment is alleged to be erroneous by the plaintiff in error: 1. Because the demurrer to the declaration was overruled; 2. On account of the refusal by the Court to give an instruction asked by the defendant, and in giving one to which he objected; 3. On the ground that a new trial should have been granted.

We think the counsel for the plaintiff in error was correct in not pressing the first and third objections. The declaration is unquestionably good. The act charged is subject to severe penalties by the laws of the *United States*, and of itself imports that moral turpitude, the charge of which is frequently the foundation of the action of slander. As the evidence upon which the Circuit Court refused to grant a new trial is not before us, we are precluded from forming an opinion as to the correctness of that refusal. With these remarks, we will proceed to the examination of the second objection.

The instruction asked by the defendant below was as follows: "That unless the jury believed from the evidence that *Allen*, the plaintiff, had, before this suit, given bond and taken the oath of office required by law, he could not recover in this action." This was refused, but the Court charged the jury "that the commission produced to the jury, with evidence that he was acting as postmaster at the time of speaking the words, and at the time of bringing this suit, is sufficient to prove his official character." The instruction refused by the Court was clearly inadmissible. The charge made against the plaintiff

was as postmaster. There was a recognition of his [\*410] official \*character, and, from the authorities, it seems that if the slander assumes that the plaintiff possesses the character, or fills the situation or office in which he is defamed, it operates by way of admission, and is *prima facie* evidence of the fact. 2 Stark. on Ev., 860; *Berryman v. Wise*, 4 T. R., 366.

It is, however, contended that as *Allen* has, by a prefatory allegation, described himself as postmaster, alleging his having been appointed and commissioned by the postmaster general, the execution of the bond, and his having taken the oath of



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office, that correspondent proof must be adduced to justify a verdict. There are principles which obviously conflict with this position, if it is taken, as the instruction asked seems to demand, to require proof not only of the commission, but of the execution of the bond, and of his having taken the oath of office. Without founding a confutation of this position upon legal presumptions, we will advert to a rule of law, that in cases where, from the precise and special nature of the allegation, the due appointment of the party to an office or situation must be proved, it is done by the production and due proof of the original appointment, when it is in writing. 2 Stark. on Ev., 373. Upon the production of a commission, or the proof of an original appointment in writing, if there be a bond to be executed, or an oath taken by the law creating the office, the presumption in fact would arise, on proof that he had acted in that capacity, that he legally acted. 2 Stark. on Ev., 859.

*Allen's* allegation of character is certainly very special, and we have seen, that although special, from the assumption of the defendant below in speaking the words, he was entitled to that character, and that proof was consequently unnecessary to sustain it; yet, admitting such necessity to exist, it would appear indisputable that the production of the commission, with proof that he acted as postmaster, was sufficient to establish his official character. To require proof of the execution of the bond, and of the oath being taken, would, we are inclined to think, be an improper extension of the rule that prefatory averments essential to the case should be proved. For, even assuming from the averment that proof of the plaintiff's being a postmaster was necessary, which it is seen was not from the defendant's recognition of that character, the commission produced with the other evidence adduced, was sufficient. We do not consider the other averments

[\*411] as essential. The case cited from the \**English* books, of a physician alleging his having taken his degree as a doctor of physic, and the necessity of proving such averment in an action of slander, by the production of a diploma or other equal proof, would seem to be founded rather upon the

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particular rights reserved to the college of physicians by its charter, than upon any common law principle. For we find that in the case of an attorney suing for his fees, and alleging that he is an attorney of a particular court, proof of his having acted as such is sufficient.

The conclusion therefore may be adopted, that evidence of the plaintiff's having acted in that particular character in which the words affect him, is *prima facie* evidence of his title to it. This conclusion is not repugnant to the rule, that prefatory averments essential to the case must be proved.

We are, therefore, of opinion that the Circuit Court was correct in refusing the instruction asked, as well as in that it gave.

*Per Curiam*.—The judgment is affirmed with three *per cent.* damages and costs.

*P. Sweetser*, for the plaintiff.

*W. W. Wick* and *C. Fletcher*, for the defendant.

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### PARKER v. BUSSELL.

**JUSTICE OF THE PEACE—JURISDICTION.**—Whenever, in a suit commenced before a justice of the peace, it appears from the pleadings, or evidence, or agreement of the parties, that the title to real estate will come in question, the suit must be dismissed for want of jurisdiction (a).

ERROR to the *Rush* Circuit Court.

STEVENS, J.—*Parker* brought an action of assumpsit against *Bussell* before a justice of the peace, on a written statement of his cause of action by him filed before the justice, in substance as follows: 1. That *Bussell*, for and in consideration of a horse, promised him, *Parker*, to execute and deliver to him a good and sufficient warranty deed for a certain half quarter section of land, which is described, and that he, the said

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(a) *Macy v. Allee*, 18 Ind., 126, and cases there cited.

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*Bussell*, has wholly failed so to do; and further, that [\*412] he, the said *Bussell*, had no \*interest in or title to said land whatever, and therefore could not convey. 2. That said *Bussell*, in consideration of another horse and the sum of ten dollars, promised to convey to him, said *Parker*, a certain other half quarter section of land, which he, the said *Bussell*, represented that he held by a good and sufficient tax title, but that if his title should not be good, one *John Leffler* was bound to make a good title, and would do so when called on for that purpose; when in truth and in fact said *Bussell* had no title whatever to said land, and the said *John Leffler* refused to make a deed, although he had been for that purpose called on. 3. A general count of *indebitatus assumpsit* for \$100 for a horse sold and delivered. 4. That said *Bussell*, in consideration of another horse, promised to deliver and assign to him, the said *Parker*, a certain collector's certificate for a certain half quarter section of land, which certificate he, the said *Bussell*, represented to be *bona fide*; and that he, the said *Bussell*, did transfer to him, the said *Parker*, by an assignment on the back thereof in these words and figures: "I assign all my right and title to the within to *Asy Parker* without recourse on me;" and did deliver to him, the said *Parker*, so assigned, a certain tax collector's certificate in the words and figures following: "The State of *Indiana*, to all who shall see these presents, greeting: know ye, that *William S. Bussell* purchased at public auction, on the second Monday in *November*, 1826, eighty acres, to wit, the east half of the north-east quarter of section number 26, in township 13 north, of range 9 east, which was sold for the tax due thereon for the year 1826, of *Jehu Perkins*, collector of the State and county revenue of the county of *Rush*, for the year 1826, for which he is entitled to a deed if not redeemed in two years from the day of the sale. Witness, *Jehu Perkins*, collector." But that the said certificate so assigned and delivered is not *bona fide*, but was obtained fraudulently from said collector, and is wholly without foundation. It is then further averred, that said *Bussell* never purchased any of the land in either of the counts mentioned.

The defendant appeared in his own proper person before the justice of the peace, and pleaded in abatement "that the justice of the peace in this behalf ought not to have or take further jurisdiction of the action aforesaid, because he says that the consideration of the horse mentioned in the plaintiff's declaration, and for the price of which this suit was commenced, [\*413] was a deed \*to a certain tract of land, &c., which was sold by *Jehu Perkins*, then collector of *Rush* county, to him, the said *Bussell*, and by him, the said *Bussell*, transferred by assignment to the said *Parker* in consideration of the said horse; that the title to said land will come in question; and that, therefore, the justice of the peace is forbidden by the statute to try the same, and that the Circuit Court of the county has sole and exclusive jurisdiction thereof." He also pleaded several pleas in bar, but the justice overruled them all, and rendered judgment for the plaintiff. The defendant appealed to the Circuit Court, and in that Court it was agreed and entered upon the record as part of the record of the case, that the facts stated in the defendant's plea of abatement before the justice of the peace were all true, and if, upon that state of facts, taking them all to be true, the Circuit Court should be of opinion that the title to the land came in question, and that therefore the justice of the peace had no jurisdiction, the Court should render judgment in favour of the defendant for costs, &c. Upon which the Court decided that the title to land did come in question, and that therefore the justice of the peace had no jurisdiction, dismissed the case, and rendered judgment in favour of the defendant for costs.

To reverse that opinion of the Circuit Court, the plaintiff has prosecuted this writ of error.

There was something said in the argument of this case about the plaintiff's statement of his cause of action being defective. In answer to that, it is sufficient to say that no formal pleadings are required before a justice of the peace. If the statement of the plaintiff's cause of action, or the defendant's defense, contain the substance of the facts and matters relied on in such



form as to be fairly understood, it is sufficient. In this case that is done.

The question to be decided by this Court is, whether the Circuit Court erred in ousting the justice of the peace of his jurisdiction of the case?

The 18th section of the act regulating the jurisdiction and duties of justices of the peace, Rev. Code, 1831, p. 297, expressly declares that justices of the peace shall have no jurisdiction "in any case where the title to lands or tenements shall come in question." This language seems to be clear and conclusive, and appears to be broad enough to extend to every

case that can arise. The plaintiff in error, however, [\*414] insists that it \*can only be extended to cases in which the plaintiff, by his statement of his cause of action, brings the title of lands directly in question, as where he brings an action of *trespass quare clausum fregit*, or ejectment, &c. If this construction is correct, the prohibition can only be extended to actions of ejectment, disseisin, writs of right, and such real actions as go expressly for the land itself, and not to any action which sounds in damages, because actions which ask for a compensation in damages only, do not necessarily, as a legal consequence, put the title of land in question: that depends entirely on the defense made by the defendant. We will take, for instance, the action of *trespass quare clausum fregit* and injuries done to land. Such an action does not, of itself, bring the title of land in question, because the defendant may admit the title of the land to be in the plaintiff, but may deny the commission of the trespass. But if he plead *liberum tenementum*, then the title to the land must come in question, and there the justice of the peace must stop.

Massachusetts, New York, New Jersey, and perhaps all the States in the Union, have the same prohibition on the jurisdiction of justices of the peace, and their adjudications are good landmarks for us. The case of *Wood v. Prescott*, 2 Mass., 174, was an action of trespass for breaking and entering the plaintiff's close, and doing injury to the fencing, &c., commenced before a justice of the peace. The defendant pleaded

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in bar that at the time when, &c., he was seized and possessed of a certain close next adjoining the plaintiff's, &c., and that when, &c., he entered into his own close, &c., as was lawful for him to do, &c. The justice supposed the title of land would come in question, and refused to proceed any further, and the case finally reached the Supreme Court, and that Court said that the defendant had not put the title of land in question, but had pleaded a distinct fact, viz: that he did not enter the plaintiff's close, but that he entered a close of his own adjoining the place in question, &c. The case of *Bispham v. Inskeep*, 1 Coxe, 231, was an action of trespass done to land, commenced before a justice of the peace, and the defendant pleaded *liberum tenementum*. That plea, the Court said, put an end to the jurisdiction of the justice. The case of *Spear v. Bicknell*, 5 Mass. Rep., 125, was an action of trespass upon land, commenced before a justice of the peace. The defendant

pleaded in bar that the place in question was a common  
 • [\*415] highway, &c. The justice conceived \*that this plea put the title of land in question, and refused to proceed any further. The case was finally taken to the Supreme Court, and that Court had some doubts, but finally said that although the defendant only pleaded an easement in the land, yet it was a real franchise, which greatly affected the plaintiff's interest in the close; and although, in common parlance, a right of way is not usually called real estate, yet it must be so in such cases as that.

The counsel for the plaintiff in error insists that the plea of the defendant is insufficient; that it is not possible for the statute to be so construed as to authorize defendants in all cases before justices of the peace to oust the justice of his jurisdiction, by simply saying that the title of lands will come in question. As to the plea of the defendant in this case, if it stood alone without the agreement entered into, it would be wholly deficient. In no case can the defendant oust the justice of his jurisdiction by simply saying that the title of lands will come in question. A plea to the jurisdiction of the court is either to the court itself, to the person of either the plaintiff or

the defendant, to the declaration, to the writ, or to the action itself in bar thereof, and can not in any case be bottomed on the defense which the defendant may say that he intends to make. Whether the title to lands will come in question, is a point which the court must determine from the issue which may be absolutely made between the parties, or from the facts which may be developed by the evidence, and not from the defendant's simply saying so. If the action is an action of disseisin, ejectment, writ of right, &c., the nature of the action is sufficient to show the court that the title of land will come in question, but if the action only sounds in damages, it does not necessarily follow that the title to the place in question will be put in issue.

The construction and meaning of the statute are plain. Justices of the peace are wisely prohibited from investigating the titles to real estate; and in all suits instituted before them, their jurisdiction ceases the instant it is discovered that the title to "lands and tenements" must come in question. That fact may be disclosed by the statement of the cause of action, or it may be disclosed by the facts which the defendant, by his plea in bar to the action, may put in issue, or it may not be disclosed by the pleadings, but may afterwards be disclosed on the trial of the case by the evidence introduced; and [\*416] as to the effect it will have upon the case, it is immaterial at what stage of the proceedings it is developed, for at that instant the proceedings must be arrested and the plaintiff nonsuited. In all cases in inferior courts, if the court has jurisdiction of the subject-matter, the special fact which ousts the jurisdiction will be a ground of nonsuit, if disclosed at any time during the trial. *Trevor v. Wall*, 1 T. R., 151. The case of *Storms v. Snyder*, 10 Johns. Rep., 109, was an action for work and labor; but the justice, after hearing the evidence, conceived that the title to land was brought in question, and nonsuited the plaintiff. In that case the Supreme Court, after examining the testimony, concluded that the justice was mistaken, that the title to land did not come in question. The case, however, shows that although the plead-

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ings do not disclose the fact that the title to land must come in question, yet if it afterwards comes before the court on the trial of the cause, by way of evidence, it puts an end to the power of the justice to proceed any further (1).

In the present controversy there can be no difficulty. The parties have settled the question themselves; they have expressly admitted by their voluntary agreement, that the title to land will come in question, and they have made that agreement a part of the record; which brings the case expressly within the letter and meaning of the statutory prohibition, and puts an end to the jurisdiction of the justice of the peace.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Perry*, for the plaintiff.

*O. H. Smith*, for the defendant.

(1) Vide *Smith v. Harris*, the next case.

### SMITH v. HARRIS.

**USE AND OCCUPATION—JUSTICE OF THE PEACE—JURISDICTION.**—If an action of assumpsit for use and occupation be commenced before a justice of the peace, and the declaration show that the plaintiff claims as an assignee of the reversion, the plea of non-assumpsit, by putting the plaintiff's title in issue, deprives the justice of jurisdiction of the cause (a).

**SAME.**—The declaration in such a suit so commenced, did not show whether the plaintiff claimed as the immediate landlord, or as an assignee. The defendant pleaded the general issue; and the evidence on the trial in the Circuit Court, on appeal, disclosed the plaintiff's claim to be as assignee. *Held*, that on such disclosure, the suit should be dismissed for the want of jurisdiction of the justice.

[\*417] \***ERROR** to the *Marion* Circuit Court. The only question submitted for the consideration of the Court in this case was, whether the title to real estate came in question? If it did, the parties admitted that, under the statute of 1831, the magistrate had no jurisdiction of the cause, and that the judgment below should be reversed.

(a) *Macy v. Allee*, 18 Ind., 126, and cases there cited.



BLACKFORD, J.—*Harris* brought an action of assumpsit against *Smith* and *Dean*, before a justice of the peace. The account filed as the cause of action is as follows: “*John Smith* and *Philip Dean* to *Mark Harris*, Dr. To the use and occupation of twenty acres of land, part of the south-east quarter of section 22, township 14, north of range 3 east, being part of the land leased heretofore by *Robert Hunt* to *Samuel Smith*, and lying in *Marion* county, which twenty acres were tended and improved and cultivated by said *Smith* and *Dean*; \$50.00. November, 1832.”

The defendant, *Smith*, appeared and pleaded two pleas. First, the general issue. Secondly, “that the title of the land is in *Benjamin I. Blythe*, &c.; that the title must come in question on the trial, &c., wherefore the defendant prays judgment, &c. The justice gave judgment against *Smith* for thirty-two dollars, with interest. *Smith* appealed to the Circuit Court, where judgment was rendered against him for forty-eight dollars.

The facts, as appears by a bill of exceptions, were as follows: The land was conveyed by *Robert Hunt* to *Harris*, by deed dated the 29th of *October*, 1832. *Smith* and *Dean* occupied the land in 1832, and cultivated twenty or thirty acres of it in corn. When *Smith* and *Dean* were gathering the corn in *November*, *Harris* demanded the rent of them. They refused to pay the rent to *Harris*, saying they had rented the land of *Blythe*, who was to keep them in possession until the ensuing *March*. The value of the rent was proved.

The question presented by this case is, had the justice of the peace jurisdiction of the subject-matter before him?

This action of assumpsit for use and occupation lies, according to our statute, where the occupation has been “in any other manner than by express contract.” Rev. Code, 1831, p. 424. It is an action, in all cases where it lies, founded on contract, and may be brought by the immediate landlord, or by the assignee of the reversion. If the action be brought by the immediate landlord, there may be a question [\*418] whether his title can be denied. If the assignee

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of the reversion sue, the doctrine is settled that he may be required to prove his title. The cause of action in the present case, filed by *Harris*, is very imperfect. It does not show whether he claims the rent as the immediate landlord, or as the assignee of the reversion. Had the statement of the cause of action shown distinctly that *Harris* claimed as assignee of the reversion, it would have been the duty of the justice to dismiss the cause, for want of jurisdiction, immediately upon the filing of the pleas. Whether it was his duty to do so, situated as this cause was, we shall not stop to inquire. The case can be decided without touching that question.

The record shows us the evidence which was given in the Circuit Court, and supplies the defects in the account filed, as to the merits of the demand. We will take the evidence as *Harris* himself understands it. He says in his brief that "the record shows that *Smith* and *Dean* previously held under *Hunt*, and that, on his transfer to *Harris*, they (*Smith* and *Dean*) became liable to pay the rent to *Harris*." This statement of the evidence shows that *Harris* claimed the rent as assignee of the reversion. The consequence is that the defendants below had an undoubted right to deny his title. They had not leased the land of *Harris*, nor entered into possession under him, nor occupied by his permission, nor paid rent to him, nor in any other way recognized his title. They were under a contract, express or implied, to pay the rent to *Hunt*, their immediate landlord, and when *Harris*, a stranger, sues them for the rent, they must be permitted to put him upon the proof of his title. They must have the right, at least, to deny his assignment from *Hunt*, and to have its validity decided by the proper tribunal. This point is expressly determined by the cases of *Sands v. Ledger*, 2 *Ld. Raym.*, 792, and *Phillips v. Pearce*, 5 *Barn. & Cress.*, 433. These authorities also show that the general issue is the only plea necessary, in such cases, to oblige the plaintiff to prove his title.

We find that, on the trial in the Circuit Court, *Harris*, for the purpose of proving his title, produced a deed from *Hunt* for the land. The deed is dated on the 29th of *October*, 1832,

and the rent demanded was for the occupation of the premises during that year. *Harris* could have no ground for recovering the rent, unless he could establish the validity of his conveyance, and his title to the land was directly in question.

[\*419] The justice had not, \*therefore, under the statute, any jurisdiction of the subject-matter, and the proceedings in the cause before him, and in the Circuit Court, were *coram non judice*, and altogether void. Gould on Pl., 237 (1).

The counsel for *Harris* refers us to the case of *Quimby v. Hart*, 15 Johns. Rep., 304, to show that the special plea denying the title, could not be filed with the general issue. In that case, the defendant filed the general issue, demanded a jury, and obtained an adjournment. After the adjournment, the plea of title was offered but was rejected as coming too late. The circumstances, under which the plea in that case was rejected, were very different from those in the case before us. Here, the special plea and the general issue were filed at the same time. Independently, however, of this consideration, the case has no application to the present one. In *New York*, where the case referred to was decided, the statute requires a special plea of title to be filed, in order to dispute the jurisdiction of the justice. Rev. Laws of N. Y. of 1813, p. 390. But our statute requires no special plea in the case. It merely says that the justice shall have no jurisdiction in any case where the title to lands or tenements shall come in question. There is no provision as to the manner of pleading, and the rules of the common law must therefore govern. By that law, as we have already observed, *Harris* was obliged, by the general issue which was pleaded in this case, to prove his title to the land; and the special plea was entirely superfluous.

The judgment of the Circuit Court for the plaintiff below must be reversed.

*Per Curiam*.—The judgment is reversed, with costs.

*C. Fletcher*, for the plaintiff.

*H. Brown*, for the defendant.

(1) Vide *Parker v. Bussell*, ante p. 411.

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M'Connell v. Maxwell and Another.

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## M'CONNELL v. MAXWELL and Another.

TROVER BY BAILEE—AGAINST GENERAL OWNER—FRAUD.—If the possession of property be fraudulently obtained from a bailee by the general owner, the bailee may maintain trover for the property against either the owner or his subsequent vendee.

[\*420] \*ERROR to the *Montgomery* Circuit Court.

M'KINNEY, J.—*Maxwell & M'Cormack*, the defendants in error, brought an action of trover in the Court below, to recover the value of a barouche and harness, against *M'Connell*. The cause was tried by a jury on the plea of not guilty, and a verdict and judgment rendered in favour of the plaintiffs.

The question presented for our determination, is founded on an exception taken by the plaintiff in error, to an instruction given by the Court to the jury. It appears that the defendant moved the Court to instruct the jury, "That if they believed from the evidence, that the defendant purchased the barouche and harness from the general owners of the same, and that the plaintiffs were bailees thereof, that, in such case, the action of trover would not lie against the defendant." The Court, however, charged the jury, "That, generally, the bailee can not maintain trover against the general owner; but that this principle had nothing to do with the decision of the present case, for the action was not against the vendors, who may have been the general owners, but against the defendant who purchased from them; and that if the vendors, although they may have been the general owners, obtained possession of the property by fraud, the plaintiffs, although bailees, can maintain this action against the defendant."

In support of the action of trover, it is necessary for the plaintiff to prove a right to the property, either absolute or special, and a right to the possession at the time of the conversion complained of; for either an absolute or a special property will support the action. The union of these distinct rights in the same person can not take place, since the latter is merged



in the former; but it frequently happens, that the same property is subject to these different relations, from whence arises the rights of the general owner in whom is the absolute property, as well as those attaching to a special property. Cases of special property, entitling to the action of trover, are numerous, embracing sheriffs after a levy, carriers, bailees, trustees, &c. During the continuance of such special property and the right of possession, the right to the action of trover is perfect. In the case of a bailee, until the conditions of the bailment are complied with, his rights are protected not only against a stranger, but against the general owner. Thus, in *Roberts v. Wyatt*, 2 Taunt. R., 268, it was decided, [\*421] that if a person who \*has a temporary property in goods, deliver them to the general owner for a special purpose, he may, after that purpose is answered, upon a demand and refusal, maintain trover for them. The same doctrine is laid down in 1 Chitt. Pl., 151; 2 Saund. Pl. & Ev., 878; and 3 Stark on Ev. 1481. It would, therefore, seem that the general proposition for which the plaintiff in error contends, and which correctly met the approval of the Circuit Court, "That a bailee of property can not maintain trover against the general owner," is subject to exceptions, than which, one stronger could not be taken than that suggested by the Court below, of a fraudulent possession in contravention of the rights of the bailee. If such possession was taken, the vendee of the general owner could not occupy more favourable ground than he himself did.

The instruction asked by the defendant must, therefore, be regarded as too general, and as subject to the qualification it received from the Circuit Court.

*Per Curiam*.—The judgment is affirmed with costs.

*D. Wallace*, for the plaintiff.

*A. S. White* and *I. Naylor*, for the defendants.

## POULK and Another v. SLOCUM.

**FALSE IMPRISONMENT—PLEADING.**—If in trespass for false imprisonment against a magistrate, he plead in justification, that the arrest, &c., was by virtue of a warrant issued by him against the plaintiff as the father of a bastard child, on the complaint of the overseers of the poor, and show that the child was not then born, or omit to state that the complaint was reduced to writing, or that the mother had failed to prosecute for the child's maintenance, or that the warrant was in due form—the plea is insufficient.

**SAME.**—An action of trespass lies against a magistrate, for an imprisonment by virtue of a warrant in such case, issued by him without a complaint authorizing it.

**SAME.**—A constable in his justification of an imprisonment under a magistrate's warrant, must show that the magistrate had jurisdiction of the subject-matter, and that the warrant on its face was legal.

**SAME.**—If the magistrate who issues a warrant, and the officer who executes it, be sued in trespass by the party arrested, and join in a plea of justification, the plea must be a good defense as to both, or it is not good as to either (a).

[\*422] \*ERROR to the Boone Circuit Court.

**STEVENS, J.**—*John Slocum* declared against *John S. Poulk, John Pauly, John Welchel* and *James Turner*, in an action of trespass, assault and battery, and false imprisonment. The declaration contains two counts, both of which are in substance the same.

The defendants pleaded jointly two pleas: 1. Not guilty. 2. A special plea in bar, alleging that on, &c., at, &c., *John Burnham* and *Abel Pennington*, overseers of the poor, &c., made complaint to him, the said *John S. Poulk*, he being a justice of the peace, &c., that one *Bethany Brissey*, an unmarried woman, was pregnant with child, which, if born, was likely to be a bastard; that the said *Bethany* and the said child, if born, were likely to become a public charge, &c., and that said *John Slocum*, a married man, was the supposed father of the said child; and directed him, the said *Poulk*, as such justice of the peace, to issue his process against said *Slocum* to appear, &c.;

(a) *Ward v. Bennett*, 20 Ind., 440, and cases there cited.

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that he, the said *Poulk*, as such justice of the peace, &c., did issue his warrant under his hand and seal, directed to said *Pauly*, he being a constable, &c., commanding him to take said *Slocum*, &c., and bring him before him, the said *Poulk*, &c., to answer said complaint, &c.; and that he, the said *Pauly*, as such constable, in obedience to the command of said warrant, did arrest, keep and detain, &c., the said *Slocum*, &c., and that he, the said *Pauly*, did, as such constable, command and order the said *Welchel* and *Turner* to aid and assist him, as such constable, in so arresting, keeping and detaining him, the said *Slocum*; and that they, the said *Welchel* and *Turner*, did, in obedience to the command of him, the said *Pauly*, as such constable as aforesaid, aid and assist in arresting, keeping and detaining him, the said *Slocum*, &c.

On the plea of not guilty, an issue was joined to the country. The second plea was demurred to, and the demurrer sustained by the Court. The issue to the country was tried by a jury; *Welchel* and *Turner* were acquitted; *Poulk* and *Pauly* found guilty; damages assessed in favor of the plaintiff, &c., and final judgment was rendered. To the judgment and proceedings in this case several objections are raised.

First, it is said that the demurrer to the defendants' plea of justification should have been overruled. The causes [\*423] of demurrer to this plea are specially set forth and stated, and among several others are the following: 1st. The plea does not show that the complaint on which the warrant issued was either under oath or in writing; 2d. It is expressly shown by the plea that the supposed bastard child was not born at the time of the arrest; and, 3d. The plea does not show that the suit was instituted by the overseers of the poor in behalf of their county; nor is it shown that the mother had neglected to bring a suit, or had commenced a suit and failed to prosecute it to final judgment.

Before we look into the plea, it will be proper to dispose of two objections raised by the plaintiffs in error. They argue that the judgment on this demurrer should have been for the defendants, and not for the plaintiffs. 1. Because the first

count of the declaration is defective. It is a general principle in pleading, that a demurrer looks through the whole record, and locates upon the first error. But it must not be forgotten, that it only reaches substantial defects, that is, such defects as are not cured by pleading to the declaration; for by pleading to the declaration all defects are cured, except such as would be good on a motion to arrest the judgment after verdict. Gould, 469, 474. That this count contains no such defects, is obvious and without doubt. 2. Because the plaintiff mistook his remedy; that his action should have been *case* and not *trespass*. If this objection is to be determined by the averments in the declaration, it must fail. The plaintiffs in error, however, insist that the whole record must be taken together; that their special plea forms a part of the record, and by the statements it contains, it is clearly shown that *trespass* will not lie; and that plea being demurred to, must be taken for true. We shall not stop to inquire, whether, if the plea were good and available in law, it could be used to that effect, but will simply as to that say, that a defective plea is not sufficient for that purpose. In general, a demurrer does admit the truth of all facts that are well pleaded, but it does not admit the truth of those that are not well pleaded. If, then, the plea under consideration is not a sufficient bar in law to the plaintiff's action, the facts stated are not admitted to be true. This at once brings us to the merits of the plea.

We will first examine this plea in reference to the justice of the peace. The defense set up is bottomed on two sections in the act respecting illegitimate children. R. C., 1831, p. 285.

[\*424] \*The 1st section of that act provides, "that on complaint made to any justice of the peace in this State, by any unmarried woman resident therein, who shall hereafter be delivered of a bastard child, or be pregnant with a child which, if born, also may be a bastard, accusing any person of being the father of said child, the justice shall take such accusation in writing, and thereupon issue his warrant directed to the Sheriff, or one of the constables of his county,



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commanding him forthwith to bring such accused person before such justice to answer to such complaint." In this provision, jurisdiction and power are given to the justices of the peace to issue their warrants, &c., on the happening of certain things, and not otherwise. The facts are, the complaint of an unmarried woman who has either had, or is pregnant with, a bastard child, and who resides in the State, accusing some person with being the father of the child, and this accusation must be reduced to writing. This is the only provision that gives, in express terms, any authority or jurisdiction to justices of the peace; and it is not contended that the plea is either within the spirit or letter of this enactment.

The 2d section of that act provides, that, "when any woman has a bastard, and neglects to bring suit for the maintenance of such child, or commences a suit and fails to prosecute to final judgment, the overseers of the poor in any township interested in the support of any such bastard child, when sufficient security is not offered to save the county from expense, shall bring forward a suit in behalf of the county, against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child." The plaintiffs in error contend, that this 2d section is merely a continuation of the 1st as to the subject-matter, and that the words "any woman," mean any such woman as is described in the 1st section; and that the suit spoken of in the 2d section, is nothing more than the making a complaint to a justice of the peace, &c., as is provided in the 1st section; and that the suit, which the overseers of the poor are authorized on certain contingencies to bring, is simply going before a justice of the peace and entering the complaint against the accused, in manner and form as the 1st section provides that the mother of the child may do. Admitting this to be the true reading and construction of this section, have the plaintiffs in error, by their plea, brought themselves within its  
[\*425] enactments? \*They certainly have not. The act requires that the complaint should be reduced to

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writing, but that was not done in this case. The defendant in error argues with some degree of plausibility, that the complaint should not only be reduced to writing, but should also be sworn to, and relies upon the constitution to sustain him. To this it may be answered, however, that the statute does not require an oath, and we do not think that this is one of the cases to which the constitution extends; but the statute does expressly require that the complaint shall be reduced to writing.

It was said in argument, that the allegation in the plea of the overseers of the poor having made a complaint to the justice of the peace, is sufficient; that it must be presumed to have been a legal and sufficient complaint. It is perhaps correct, that if the overseers of the poor are by the statute authorized to make such a complaint, and to cause a warrant to issue, that statement might be sufficient on the face of the warrant to sustain the warrant; but when an officer undertakes to justify under the process of a court of inferior, special, or limited jurisdiction, he must show by direct and certain allegations that the process was within the jurisdiction, and not leave it to be supplied by intendment and inference. In this case, a justice of the peace has no general jurisdiction of the subject-matter, and he can only exercise such jurisdiction by virtue of a certain complaint, specially described by statute, and that complaint must be reduced to writing, &c.; and that special and limited jurisdiction is given by one single section of the act above recited, and is unaided by either the common law or by the statute defining his general powers and duties; and the power of the overseers of the poor to interfere in cases of bastardy, is given by another section of the same statute, and is more special and limited than that of the justice of the peace. Neither the justice of the peace, nor the overseers of the poor, can do anything by implication; they are limited to the express power given; and when they attempt to justify the assault, arrest, and imprisonment of a fellow-citizen under such authority, they must, in direct, clear, and unequivocal terms, bring their acts within that authority.

If the overseers of the poor have the power thus to interfere in cases of bastardy, and cause such complaints to be made, &c., the statute is express that it is not until after the child is born; this plea expressly shows that the child [\*426] in this case was not \*born. Again, the statute is express that the overseers of the poor shall not interfere, unless the mother fail to prosecute, &c.; this plea contains no averment that the mother had failed in any way to prosecute. There are various other defects in the plea, but it is not necessary to notice them all specially; but it may perhaps be proper to notice one other, that is respecting the warrant which was issued by the justice; the plea has no averment to show that the warrant was a legal writ on its face, or was in due form of law.

This plea is in every point of view defective, and does not bring the justice of the peace within the jurisdiction he has assumed, and is therefore, as to him, no bar to the action, and can not be taken as part of the record to show that the action should have been *case* and not *trespass*.

This point respecting the misconception of the action, was argued with great ability and skill. It was urged with much plausibility, that the action should have been *case* and not *trespass*; and that the distinction is this: When the immediate act of imprisonment proceeds from the justice of the peace himself, trespass is the remedy, but where the imprisonment by the justice is in consequence of information from another, an action on the case is the proper remedy. The case of *Morgan v. Hughes* is cited to sustain this position. The naked principle here stated may in some cases be good law, if properly applied, but as it appears to be intended to be used in this case, it is not sound doctrine. The case of *Morgan v. Hughes*, 2 T. R., 225, was this: *Hughes*, the justice, falsely and maliciously issued a warrant against *Morgan* for larceny, without any charge or accusation being made by any one against him, stating on the face of the warrant that one *Davies* had made the charge. The Court said that the justice was liable in trespass, because the imprisonment proceeded from

him without any lawful authority, but, said the Court, if *Davies* had really made a legal charge of larceny against *Morgan*, then the justice would have had legal authority to issue the warrant, and would not have been liable to the action of trespass; and it may be further said, if *Davies* had really made a legal charge against *Morgan* of larceny, and the justice had honestly issued his warrant on that charge, he would not have been liable to any action; but if the charge had been false and without probable cause, and the [\*427] justice, although cognizant of that fact, still \*issued his warrant, he would have been liable to an action on the case for malicious prosecution. Whenever the suit or prosecution is before a court that has jurisdiction of the subject-matter, and is as to forms of law legal, the action of trespass will not lie; the action must be case. But to say that a justice of the peace is not liable in an action of trespass, in any case where a complaint has been made to him by another, can not be law. To screen the justice of the peace, the complaint must be a legal one, and such a one as will authorize him, under the law, to act upon it.

Another position taken by the plaintiff in error is, that although the plea may be insufficient to protect the justice, yet it is sufficient to protect the constable and those who aided him; that the constable was a mere ministerial officer and was bound to execute the writ, unless it appeared upon its face that the justice had no jurisdiction. This is somewhat a vexed question. There is much contradiction in the books about what an officer is required to show, to justify himself in the execution of process.

In the case of *Lucking v. Denning*, Salk., 201, much was said upon the subject. That case was this: An action on the case was brought against a sergeant at mace for an escape, by virtue of a process of the Court of the sheriffs of *London*, in an action of debt upon a bond sued there. The jurisdiction of the Court extended to all actions of debt upon contracts, bonds, &c., if made within the city. In proof upon the trial of the case, it was developed that the bond was not made in



the city. The Court, after much consultation, ruled: 1. Where an inferior court is confined to certain persons, as the *Marshalsea* was to those of the household, if it is not averred on the face of the proceedings, that the person suing is qualified, and is within the jurisdiction, the proceedings are *coram non judice* and void, and the officers all liable. 2. When the inferior jurisdiction is confined to some particular thing, and the suit is for something else, the proceedings are *coram non judice* and void, and the officers all liable. 3. But where the jurisdiction is limited to causes of action, arising in a particular limited territory, the Court may award process, and the officers may execute it, unless it appear on the face of the proceedings that the cause of action arose out of the jurisdiction. The officers are not bound to inquire where the cause of action arose.

[\*428] \*In the case of *Smith v. Shaw*, 12 Johns. Rep., 257, the Court says that the general rule is, that where the subject-matter of the suit is not within the jurisdiction of the Court, everything done is absolutely void, and the officers become trespassers; but where the subject-matter is within the jurisdiction generally, and the want of jurisdiction applies only to the particular person or place, the officer is excused, unless the want of jurisdiction appears on the face of the process. In the case of *Perkin v. Proctor*, 2 Wils., 382, the Court decided that if a commission of bankruptcy is improperly sued out, on a false statement of facts set forth in the petition of those who apply for the commission, against a person who is not liable to be declared a bankrupt, not being a trader, the commission is void, and trespass will lie against the persons who petitioned for the commission, but not against the ministerial officers. But if the petitioners had not stated in their petition the necessary facts to bring the case within the law, and authorize a legal grant of a commission, and a commission had been granted without the necessary facts to authorize it being stated, the whole proceedings would be *coram non judice* and void, and the ministerial officers liable. In the case of *Ladbroke v. Crickett*, 2 T. R., 649, it was said,

that if it appeared upon the face of the proceedings and process that the Court had jurisdiction, the ministerial officers would be justified. Vide also *Shergold v. Holloway*, 2 Str., 1002.

In the case of *Savacool v. Boughton*, 5 Wend. Rep., 170, the subject is argued at great length, and the Court says that it is well settled: 1. That if the process upon its face is void for want of jurisdiction in the court, of either the subject-matter or the person, it is *coram non judice*, and affords no protection to any one. 2. That where the Court has general jurisdiction of the subject-matter and the person, and the process is regular on its face, the officers are protected. 3. That several respectable authorities exist, where it is said that if courts of limited jurisdiction transcend their limits, their proceedings are *coram non judice* and void, and all concerned are trespassers.

These authorities have been mentioned for the purpose of presenting something like a chain of similar decisions, as to their principal details. The books, however, contain numerous adjudications on the same subject, all more or less differing

from each other in many particulars. The great leading principle \*may, perhaps, be said to be this:

When a ministerial officer justifies under authority, he must clearly show that authority. He must show that he acted under a court having jurisdiction of the subject-matter, &c.; that the process or command which he executed, was on its face legal, and such as the Court had power to legally issue; and that he did no more than execute the command in a legal manner.

If the plea in this case be tested by this rule, it can not justify the constable. This plea does not show that the warrant was legal upon its face, or was such a warrant as a justice of the peace was legally authorized to issue under any circumstances. The warrant in cases of bastardy must issue in the name of the State, &c. *Woodkirk v. Williams*, 1 Blackf. Rep., 110. It is not shown that this warrant was in the name of the State. In all cases where an officer justifies under process, the plea must aver that the process was in due form of law; but this plea contains no such averment. In all warrants issuing

in the name of the State, the true substance of the charge on which it is issued must be set forth in the warrant, upon which to bottom and authorize the command to arrest the person, &c. This plea, however, contains no averment showing that the warrant, in this case, contained any statement of any complaint whatever, or that the command to arrest the accused was bottomed upon a legal complaint of any description. It is impossible, from the face of this plea, to form even a conjecture whether the warrant had any sufficient legal form or substance in it: it can not therefore protect the officer. But if it did, it could not be available unless it protected the justice of the peace also. It is a principle in pleading, to which there can not be any exception, that where several defendants join in pleading in bar, if the plea is bad as to one defendant, it is bad as to all; for the Court can never sever the plea, and say that one defendant is guilty and that another is not, when they all put themselves on the same terms. 1 Chitt. Pl., 545; *Moors v. Parker et al.*, 3 Mass. Rep., 310; *Marsteller et al. v. M'Clean*, 7 Cranch., 156; *Parsons v. Loyd*, 3 Wils., 341; *Collett v. Keith*, 2 East., 260; 1 Saund. Rep., 28.

In this case the plea is joint, and being as to one insufficient, is insufficient as to all.

It is said that the judgment respecting costs is erroneous.

As to so much of the judgment as relates to the costs [\*430] recovered by \*the two defendants who were acquitted, there may be perhaps a slight error, but as it is in favor of the plaintiffs in error, and does not vitiate the judgment against them, they can not assign it for error.

*Per Curiam*.—The judgment is affirmed with *one per cent.* damages and costs.

*A. S. White* and *R. A. Lockwood*, for the plaintiffs.

*J. B. Ray*, for the defendant.

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 Martin and Another v. Kennard.
 

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### MARTIN and Another v. KENNARD.

**SUIT ON BAIL BOND—PLEADING.**—If a declaration on a bond for the prison limits set out the condition of the bond, it must aver the existence of the judgment and execution under which the bond was given (a).

**APPEAL** from the *Marion* Circuit Court.

**BLACKFORD, J.**—This was an action of debt by *Kennard* against *Martin* and *Landis*, on a bond for the prison bounds. The declaration states that *Martin* and *Landis* executed their bond, payable to *Kennard*, in the penal sum of \$132. It also states that there is a condition to the bond, which recites that *Martin* had been delivered to the custody of the sheriff by virtue of a *capias ad satisfaciendum* issued by a justice of the peace in favor of *Kennard*, and which concludes with stating, that the bond is to be void if *Martin* continues a prisoner. *Martin* suffered judgment by default. *Landis* pleaded several pleas in bar. The pleas were demurred to, and judgment on the demurrers was rendered for the plaintiff below.

It is not necessary to examine the pleas, as we consider the declaration to be substantially defective. The declaration shows, that the obligation was given under the statute relative to the prison bounds. It should appear, therefore, by the declaration, that the obligee had previously obtained a judgment, and caused a *capias ad satisfaciendum* to issue, against the principal obligor. As the declaration shows the nature of the bond, it should have also shown the existence of a case in which its execution was authorized by the statute. A declaration on a bail bond, setting out the condition, must show that a writ requiring bail had previously issued against the  
 [\*431] person for whose \*appearance the bond was given. 2 Chitt. Pl., 215. A declaration on a replevin bond in the case of a distress, if it set out the condition, must show that the goods, for the return of which the bond was given, had been distrained for rent. 2 Chitt. Pl., 218. So, in a suit

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(a) *Draggool v. Graham*, 9 Ind., 212, and cases there cited; 11 Ind., 548.



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Brown v. White, in Error.

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on a bond for the prison limits, if the declaration describe the nature of the bond, it must aver the existence of the judgment and execution, which gave occasion for the execution of the bond.

The declaration states that it is recited in the bond that a *capias ad satisfaciendum* had issued, but the statement of there being such a recital is very far from an averment by the plaintiff of the existence of the writ.

The judgment for the plaintiff below must be reversed, and leave be given him to amend his declaration.

*Per Curiam*.—The judgment is reversed, with costs. Cause remanded, &c.

*J. Morrison*, for the appellants.

*J. H. Scott*, for the appellee.

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BROWN v. WHITE, in Error.

*BASIL BROWN* and *George W. L. White* were partners in a certain business, and dissolved their partnership in February, 1833. By the article of agreement dissolving the partnership, *Brown*, in consideration of *White's* relinquishment of his interest in the partnership property, agreed to pay *White* \$600, one-half in the month of *June* following, and the other half within twelve months, and to discharge the debts of the firm, and indemnify *White* from the payment of the same: "For the performance of which," as the agreement stated, "*Brown* was to give to the said *White* security."

In an action of covenant by *White* against *Brown* on this agreement, in which the plaintiff averred performance of his part, and recovered, the following points were decided:

1. The security contemplated by the agreement, to be given by *Brown*, was for his payment of the \$600, as well as for his performance of the other covenants.

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Nelson v. Hinesley, in Error.

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[\*432] \*2. For a breach of any of *Brown's* covenants in the agreement, a suit might be sustained against him by *White*, without an averment in the declaration that a performance had been previously requested.

3. Promissory notes executed by *Brown* alone were not the security for the payment of the \$600, which was required by the agreement.

*J. Morrison*, for the plaintiff.

*C. Fletcher* and *W. Quarles*, for the defendant.

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NELSON v. HINESLEY, in Error.

THE parties in this case agreed, in *March*, 1833, by a writing under seal, that certain matters in difference between them should be referred to arbitrators; that the parties should, at their peril, take notice of the time and place of the meeting of the arbitrators; that the award should be made a rule of the *Marion* Circuit Court, and that judgment should be entered on the award, if against *Nelson*, at the next term of the Court.

In *May*, 1833, the arbitrators filed in the clerk's office the agreement of submission, and their award against *Nelson* for fifty dollars, with costs. At the *September* term of the Court *Hinesley* appeared, *Nelson* made default, and judgment was rendered on the award.

*Held*, that previously to the rendition of judgment in this case, the award should have been recorded, and a rule taken and served on *Nelson*, to show cause why the award should not be made the judgment of the Court, and that as these previous steps had been omitted, the judgment was erroneous.

*C. Fletcher*, for the plaintiff.

*J. B. Ray* and *J. Eccles*, for the defendant.

[\*433] \*TAYLOR and Others v. HILLYER.

**PARTNERSHIP NOTE FOR INDIVIDUAL DEBT.**—If a promissory note, executed by a partner in the name of the firm, be for his individual debt, which is known to the payee, it is not binding on the partnership.

**SAME—STATUTE OF FRAUDS.**—A subsequent promise to pay such a note by the partner not bound by it, is within the statute of frauds, and does not bind him.

**ADMISSIONS OF PARTNER.**—The admissions of a partner, made after a dissolution of the partnership, and not relating to the previous business of the firm, are not admissible as evidence to charge the other partners.

**POWER OF PARTNER AFTER DISSOLUTION OF PARTNERSHIP.**—A promissory note, executed by a partner in the name of the firm, he having previously retired from the partnership, and that fact being known to the payee, does not bind the other partners.

**INSTRUCTIONS TO JURY—PRACTICE.**—It is error in the court to refuse to give a particular instruction to the jury, if, in law, the party is entitled to it.

**ERROR to the Posey Circuit Court.**

**STEVENS, J.**—The material facts of this case are these: *James Hillyer*, the defendant in error, brought an action of debt in the *Posey Circuit Court* against *William G. Taylor, Livingston G. Taylor, Heman B. Taylor, Joseph Fauntleroy, Butler Fauntleroy, Robert H. Fauntleroy, Warren W. Lewis, and Amos Clark*, merchants, trading under the firm of *Taylor, Fauntleroy & Co.*, and avers in his declaration that on the 4th day of *February, 1829*, they, the said *Taylor, Fauntleroy & Co.*, made their promissory note to *James H. Moore and John W. Casey*, merchants, trading under the firm of *Moore & Casey*, by which they, the said *Taylor, Fauntleroy & Co.*, for value received, promised to pay to *Moore & Casey*, one year after the date of said promissory note, the sum of \$2,300, with interest, and that afterwards, on the 21st day of *November, 1829*, before the said promissory note became due, and before anything was paid thereon, *Moore & Casey* assigned and transferred it to the said *James Hillyer*, of which they, the makers, had notice, concluding with the usual averments of non-payment.

To this action the defendants, *Taylor, Fauntleroy & Co.*, pleaded under oath the plea of *nil debet*, on which an issue was

joined to the country, a jury trial had, and a verdict and judgment rendered for the plaintiff for the amount of the face of the note, with interest.

It appears of record, by a bill of exceptions, that the cause was tried upon the general issue, on the plea of *nil* [\*434] *debet*, with \*an agreement between the parties that all matters might be given in evidence under that general issue, which could have been specially pleaded. The whole of the evidence given on the trial is also set out in a bill of exceptions, and made a part of the record, by which it appears that the defense set up by the defendants was, that the said promissory note for \$2,300 was given for the private and individual debt of the said *William G. Taylor*, who had recently been one of the said firm of *Taylor, Fauntleroy & Co.*, by the said *William G. Taylor*, without the knowledge or consent of the firm; and that the said *Moore & Casey* knew, at the time they took said note from said *William G. Taylor* in the name of the firm of *Taylor, Fauntleroy & Co.*, that the firm did not owe the money, and that the note was executed by said *Taylor*, in the name of *Taylor, Fauntleroy & Co.*, without authority, and without the knowledge or consent of the firm, and was therefore obtained by fraud and collusion. It also appears of record, among the evidence taken and submitted to the jury, that some few days before the making of the said promissory note, the said *William G. Taylor* sold all his interest in the firm of *Taylor, Fauntleroy & Co.* to his son, *Heman B. Taylor*, one of the members of the concern, and withdrew from the partnership. It is also shown of record, by the bill of exceptions, that the plaintiff introduced evidence to prove that one, or perhaps two of the individuals, partners of the firm, did, some time after the making of said note, admit that the firm was liable to pay the note, and that one of those partners had once said he would pay, if goods and merchandise would be received in payment.

It also appears of record, by a bill of exceptions, that after the evidence was closed, and before the jury retired from the bar, the defendants asked the Court to instruct the jury that



an individual partner of a firm can not bind his co-partners by a promissory note, except it be in a partnership transaction, and that if the jury should believe that the note on which the suit was brought was given by *Taylor*, for his own individual debt, and that that fact was known to the payees at the time they procured the note, the verdict ought to be for the defendants; and, also, that the subsequent verbal promise of the one partner to pay a note thus given by the other partner for his individual debt, is void under the statute of frauds; and, also, that the admissions of an individual partner of a firm, [\*435] made \*after the dissolution of the partnership, and not relating to the previous business of the firm, are not evidence to charge the other partners; and, also, if said *Taylor*, who made the note in the name of the firm, was not, at the time he made the note, one of the members of the firm, and the payees, at the time, knew the fact of his having ceased to be a member of the partnership, the firm is not bound to pay the note.

The instructions being opposed by the counsel for the plaintiff, the Court refused to give them, and also refused to give any instructions whatever. To which refusal of the Court the defendants excepted.

It also appears of record by another bill of exceptions, that after the jury had returned their verdict into court, and before final judgment was rendered thereon, the defendants moved the Court to set aside the verdict and grant them a new trial; because the verdict was contrary to law and evidence, and because the Court had erred in refusing to instruct the jury as asked. This motion was overruled, and a final judgment was rendered on the verdict; to which opinion of the Court in overruling the motion for a new trial the defendants also excepted.

Whether the evidence in this case sustains the verdict of the jury, is a question that we have not looked into. This opinion relates exclusively to the refusal of the Court to instruct the jury.

It is said by the Supreme Court of the *United States*, in the

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Tomlinson and Others v. Collett and Another, in Error.

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case of *Livingston et al. v. The Maryland Insurance Company*, 7 Cranch, 506, 544, that if in point of law a party is entitled to a particular instruction to the jury, and the Court refuses to give it, it is error; that the party has a right to a pointed and positive instruction, if it is required. And, again, in the case of *Etting v. The Bank of the United States*, 11 Wheat., 59, the Court says, that the inferior court is not to be the sole judge whether instructions asked are relevant or not, but if the Court refuse to give the instructions on that account, the party may take his bill of exceptions, and if he can show that the instructions were relevant, it will avail him.

In the case now under consideration, the evidence clearly shows that the instructions asked as above noticed were relevant, and were some of the material points which the jury had to decide; and upon a view of the whole of the facts [\*436] and \*evidence disclosed by the record, we think that in point of law the party was entitled to the instructions asked, and that the Court erred in refusing them (1).

*Per Curiam*.—The judgment is reversed and the verdict set aside, with costs. Case remanded, &c.

*S. Judah*, for the plaintiffs.

*C. Dewey* and *C. I. Battell*, for the defendant.

(1) Vide *Yandes et al. v. Lefavour et al.*, Vol. 2 of these Rep., 371, and note.

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### TOMLINSON and Others v. COLLETT and Another, in Error.

IF the general issue be pleaded in an action of assumpsit against partners, the plaintiff must prove the partnership (a).

Partners may be liable for goods purchased for them by their agent, although the agent, at the time of the contract, mention the name of only one of his principals.

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(a) See *Dickensheels v. Kaufman*, 28 Ind., 251; 13 Id., 258.

## Thompson v. Coquillard, in Error.

The declarations of an agent, at the time of making a contract for his principal, may be proved to show the character in which the contract was made, but they are not evidence to prove the agency; nor are the agent's declarations, made subsequently to the contract, admissible as evidence for any purpose. Paley on Agency, 207 (1).

In an action against the principal for the price of goods bought for him by an agent, the delivery of the goods to the agent may be proved, without calling him as a witness, or accounting for his absence.

A person whom a man puts in his place to transact his business of a particular kind is a general agent, and such authority empowers the agent to bind the employer by all acts within the scope of his employment; and that power can not be limited by any private order or direction, not known to the party dealing with the agent. Paley on Agency, 163.

The agent of a company of persons engaged in digging for salt water, who has the general superintendence of their works, may contract debts in their name which will be binding upon them, for such articles as may be suitable for the boarding and clothing of the hands employed at the works.

[\*437] \**S. Judah and J. Law*, for the plaintiffs.

*J. Whitecomb and J. Farrington*, for the defendants.

(1) "The confessions of an agent are not evidence to bind his principal; nor is his subsequent account of a transaction to his principal, evidence. But his acts, within the scope of his powers, are obligatory upon his principal, and those acts may be proved in the same manner as if done by the principal. The agent, acting within his authority, is substituted for the principal in every respect; and his statements, which form a part of the *res gesta*, may be proved." *United States v. The Brig Burdett*, 9 Peters, 689.

## THOMPSON v. COQUILLARD, in Error.

DEBT by *Alexis Coquillard*, for the use of *Isaac Marquiss*, against *Lewis G. Thompson*, on a promissory note in the follow-

ing words: "Due *Alexis Coquillard* or order \$212, for value received. *L. G. Thompson*." There was on the note the following assignment: "Pay the within to *Isaac Marquiss. A. Coquillard*." The note was filed, under the statute, instead of a declaration.

A plea in abatement, for a variance between the writ and note as the declaration, was filed; the writ being against *Lewis G. Thompson*, and the note against *L. G. Thompson*. Demurrer to the plea and judgment of *respondeas buster*. Demurrer to the note as a declaration, and judgment for the plaintiff below.

*Quære*, whether the note in this case could be filed as a declaration, the christian name of the defendant not being shown by it; or whether, if the note could be so filed, an explanation of the name should not appear in the writ. See *Hays et al. v. Lanier et al.*, November term, 1833 (1).

As the note in this case was assigned to *Marquiss*, and the assignment remained uncanceled, it was held that the suit on the note could not be sustained in *Coquillard's* name, without showing that it was his property, notwithstanding the assignment. *Neyfong v. Wells*, Harden's Rep., 561; *Bowie*, for the use of *Ladd v. Duvall*, 1 Gill & Johns., 175; see, also, *Dugan v. The United States*, 3 Wheat., 172.

[\*438] \*The judgment was reversed, with costs.

*H. Cooper*, for the plaintiff.

*D. H. Colerick*, for the defendant.

(1) Ante, p. 322. Vide *Hughes v. Walker, Carter & Co.*, May term, 1835, post.

### CHESS v. KELLY and Others.

**TRESPASS—PLEADING.**—Trespass for entering the plaintiff's close. Plea, that the defendant entered to take his corn growing there, which had been distrained by the plaintiff for rent due from a third person, but which corn, on a trial of the right of property, had been adjudged to be the defendant's. Held, that the plea was insufficient.



ERROR to the *Lawrence Circuit Court*.

BLACKFORD, J.—Trespass *quare clausum fregit* by *Chess* against *Kelly, Strother, Vest, and Dilby*. The declaration states that the defendants broke the plaintiff's close, and cut down and carried away his corn.

The defendants pleaded specially as follows: That the plaintiff had distrained the corn for rent due from a third person; that *Kelly* filed a claim to a part of the corn; that the triers found the corn so claimed to be *Kelly's*; and that the justice gave judgment on the verdict for *Kelly*. The plea also states that, after this judgment, *Kelly*, with the other defendants as his assistants, entered the close and gathered the corn, which is the same trespass. The plea also states, that after the corn was gathered, *Chess* appealed from the judgment of the justice; that *Kelly* gave a bond with surety, as required by the justice, conditioned for the delivery of the corn to *Chess*, if it should be adjudged to be his; and that the judgment on the appeal was in favour of *Chess*.

There was a demurrer to this plea, and judgment for the defendants.

The gist of this action is the breaking of the plaintiff's close; and the point to be decided is, was the trespass which is charged justified by the facts pleaded? We do not consider the justification to be sufficient. Supposing the corn to have

been *Kelly's* property; that circumstance alone did [\*439] not authorize \*him to enter upon the plaintiff's land to take it. The determination of the triers could do nothing more than establish the right of property to be in *Kelly*. It could not authorize him to go and take the corn wherever he could find it. If *Chess*, in whose possession the corn was, refused to deliver it to the owner, he was liable to an action at law for his improper conduct; but there is nothing in the plea to show that *Kelly* had a right to enter on the plaintiff's close and take possession of the corn. There are some cases where a man, to take his personal property, may enter on the close of another, but the facts set out in the plea before us do not show a case of that description (1).

The plea is bad, and the judgment on the demurrer is erroneous.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. H. Thompson*, for the plaintiff.

*C. Dewey*, for the defendants.

(1) *Trespass quare clausum fregit*. Plea, that the defendant was the owner of a barn and of certain goods being on the plaintiff's close, &c., and that he entered to take them, &c. Demurrer to the plea.

The counsel for the defendant, to support the plea, cited *Taylor v. Friskin*, Cro. Eliz., 246; *Millen v. Hawery*, Latch, 13; Vin. Abr. Tresp. H., a. 2; *Dyke v. Danstan*, 6 Ed., 4, 18; *Millen v. Fandry*, Poph., 161; Co. lib. 4, 38 b; Com. Dig. Pl., 3 M., 42; Year Book, 17 H., 6; *Absor v. French*, Show., 28; *Henn's Case*, Sir W. Jones, 296; *Lifford's Case*, 11 Rep., 52 a.; Com. Dig. Pl., 3 M., 38.

*Tindal*, C. J., after stating that the barn appeared to be affixed to the freehold, and that the plea was, for that reason, bad, expressed himself as follows:

"But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breaches of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another: that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case

of a tree which is blown down, or through decay falls into the ground [\*440] of a neighbor, the owner may enter and take it. \*But the distinction

is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken, and the owner pursues to obtain possession, the principle is laid down by Blackstone, 3 Comm., 4, who says, 'If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I can not justify breaking open a private stable, or entering on the grounds of a third person to take him, except he be feloniously stolen; but must have recourse to an action at law.' A case has been suggested in which the owner might have

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no remedy where the occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit." The other judges expressed similar opinions. *Anthony v. Haneys et al.*, 8 Bing., 186.

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ANDREWS v. JONES and Another.

CONTINUANCE.—The right to a continuance of a suit in chancery until the next term after the issue is completed is not given by the statute unless depositions are to be taken (a)

MORTGAGE—FORECLOSURE—DECREE.—On a bill to foreclose a mortgage, all the mortgaged premises may be ordered to be sold.

SAME—PAYABLE IN INSTALLMENTS.—A mortgage, given to secure the payment of a certain debt by installments, contained an agreement that on default in the payment of any one installment, the whole debt should be then payable, subject to a deduction of interest from the payment of the money, to the time when it was to have been paid had no default occurred. *Held*, that on the non-payment of any installment when due, a bill of foreclosure might be filed. *Held*, also, that the liability to pay the whole debt, upon any such default, could not be considered as a penalty (b)

ERROR to the *Wayne* Circuit Court.

M'KINNEY, J.—This was a bill in chancery, brought by *J. C. & C. Jones*, against the plaintiff in error, to foreclose a mortgage.

The bill in substance states, that on the 21st day of *June*, 1832, the defendant executed a deed of mortgage to the complainants for certain lots of land in the town of *Richmond*, to secure the payment of the sum of \$202, within sixty days, the sum of \$618 within six months, the sum of \$636 within twelve months, and the further sum of \$490.50 within eighteen months, respectively, from the date of the said conveyance; that it was agreed by the conveyance, that should default

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(a) *Ryhn v. Cochran*, 7 Blackf., 417; 2 Ind., 117.

(b) *Hunt v. Harding*, 11 Ind., 245, and cases there cited.

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[\*441] be made in the payment of either \*of the said sums, within the time when they are respectively made payable, then and in that case, the whole sum stipulated to be paid by the said conveyance, shall become due and payable, upon such default in the payment of any one installment, yet subject to a discount of *six per cent. per annum*, from the time the same may be paid, up to the time when the same would have been due and payable, had no such default been made in the payment of any installment. The complainants aver, that the first sum stipulated to be paid, was paid within the specified time; that the second for \$618 was not paid, but a part of it, \$545, was paid after the same became due and payable; that the two last installments remain unpaid. Prayer for general relief.

The defendant below demurred to the bill, showing the following causes: 1. The last payment on the mortgage was not due at the time of filing the bill, to wit, on the 15th of *July*, 1833; 2. The provisions of the mortgage on the question of forfeiture are in effect penal, and not operative, therefore the suit is prematurely brought. The Circuit Court gave judgment on the demurrer in favour of the complainants.

The defendant then answered the bill, alleging the payment of a sum of money which was not credited. The complainants admitted the sum claimed as a credit, and, on their motion, the cause was submitted to the Court on bill, answer, replication, and exhibits, the defendant objecting to the submission, and asking a continuance for a final hearing. The Court, however, heard the cause, and rendered a decree for the complainants.

Several errors are assigned: 1. In overruling the demurrer to the bill; 2. In not continuing the cause to the term next after the issue was made up; 3. In decreeing the sale of all the mortgaged premises, and that the overplus should be paid to the plaintiff in error.

The principal question to be determined is embraced by the first error assigned. Before we approach that, we will dispose of the two last objections.



The provision of the statute regulating the submission of causes in chancery, 12th sec. Pr. in Ch. Rev. Code, 1831, is as follows: "The issue may be made up by bill and answer, where a special replication is unnecessary, and when depositions are to be taken, the cause shall stand for hearing at [\*442] the term next \*after the issue is completed." In the case before us the submission was on bill, answer, replication, and exhibits. The issue was made up, and as there was no application to continue the cause with a view to take depositions, it would seem that the statute does not authorize a continuance, and that the Circuit Court was therefore correct in refusing it. A continuance after the issue is made up, when depositions are to be taken, is founded upon the right of a party to meet the issue by testimony.

The third objection is settled by the case of *Shirkey v. Hanna et al.*, decided at the present term (1).

In support of the demurrer to the bill, two grounds are assumed: 1. That the suit was prematurely brought, the last payment on the mortgage not being due at the time of filing the bill. 2. That the condition in the mortgage is penal, and therefore not operative.

Before we examine the provisions of the statute regulating the mode of proceeding in foreclosing a mortgage, it may not be irrelevant to remark, that prior to the statute, if a mortgage was executed to secure the payment of a sum of money payable by installments, upon a failure to pay the first installment, a bill to foreclose could have been exhibited. The forfeiture then accrued. *Adams et al. v. Essex*, 1 Bibb, 149.

The 25th section of the execution law, R. C., 1831, contains the provision by which mortgages are to be foreclosed. It provides, on default being made "in the payment of the mortgage-money, or the performance of the condition or conditions which they, &c., should have paid or performed, or ought to pay or perform, in such manner and form, and according to the effect of the respective provisions, conditions, or covenants comprised in the deeds of mortgage or defeasance, and at the days, times and places in the same deeds respectively mentioned

and contained, in any purchase, it shall and may be lawful for the mortgagee, &c., at any time after the expiration of the last day whereon the said mortgage-money ought to be paid, or other conditions performed, to file his bill, &c., in the proper Circuit Court, according to the course of the common law, to foreclose the equity of redemption," &c.

The statute does not restrain the right to covenant or enter into conditions, upon the non-performance of which, [\*443] a bill to \*foreclose an equity of redemption may be exhibited. It guards that right, and if such covenant or condition be not repugnant to law, it may be enforced. The only change in the common law made by the statute, we think, consists in its preventing a forfeiture of the mortgage, by a default made in the payment of one installment, where a sum of money is stipulated to be paid in several installments. But where a party thinks proper to waive the statutory provision, in the case of a sum of money agreed to be paid by installments, and covenants that on a failure to pay any one installment, the whole debt shall become due, it is a condition within the letter of the statute, which a Court would enforce. Suppose by the deed of mortgage, a power had been given to sell the land, without the intervention of a Court of equity, can it be doubted, if that power had been strictly pursued, but that the sale would have been valid, provided we have no act, a question not now before us, requiring the intervention of a Court of equity to give validity to such sale. We think no doubt of this can be entertained.

The question then arises, the mortgagees having adopted this mode of foreclosing, on what day should the mortgage-money have been paid, or other condition in the mortgage-deed been performed? After specifying the different sums to be paid, and the several periods of payment, the deed contains this covenant: "It is further agreed, that should default be made in the payment of either of the above sums, within the time when they are respectively payable, then and in that case, the whole sum herein (by the deed), stipulated to be paid, shall become due and payable upon such default of

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payment of any one installment, yet subject to a discount of *six per cent. per annum*, from the time the same would have been due and payable, had no default been made in the payment of any installment." Here is a special covenant, which, if not construed a penalty, determines that the last day on which the mortgage-money became due, was on the day that default was made in the payment of either installment.

This brings us to the inquiry, whether the condition is a penalty or not?

In *Tayloe v. Sandiford*, 7 Wheat., 13, it is said, "In general a sum in gross, to be paid on the non-performance of an agreement, is regarded as a penalty." In *Astley v. Weldon*, 2

Bos. & Pull., 346, a penalty is defined "a forfeiture [\*444] annexed to a \*contract or agreement, either for the

better enforcing a prohibition, or by way of security for the doing of some collateral act agreed upon between the parties." So, when the payment of a smaller sum is secured by a larger, it must always be considered as a penalty. This question most frequently arises, when connected with that of liquidated damages; and some general rules have been adopted to determine when a sum covenanted to be paid shall be regarded as a penalty or as liquidated damages. Thus Starkie (3d vol. on ev., 1130) says: "Whether a particular sum specified in a covenant or other agreement was intended as a penalty, or as liquidated damages, depends on the *form* of the instrument, and the *intention* of the parties, as collected from the whole of the instrument; and that "where the party binds himself to pay a specific sum as stipulated damages, or as a sum forfeited or due for non-performance of an agreement, such as not to continue in a particular trade or business, &c., and in general, as it seems, where a party enters into a contract, bottomed on a good consideration, to pay a stipulated sum in case he violate the contract, that sum is to be considered as stipulated damages."

Two cases in which this question has been made, have been before this court (*Gully et al. v. Remy*, 1 Blackf. Rep., 69, and *Horner v. Hunt*, Id., 213), in which it was decided, that, on a

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Adams v. Lisher, on Appeal.

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note for a certain sum payable on a specified day, with interest from the date if not punctually paid, interest from the date was recoverable in case of default. We entirely approve of the decisions in these cases, and are unable to distinguish a difference in principle between them and the case before us.

The condition, that a forfeiture should accrue on the non-payment at the specified time of any one of the installments, did not impose on the plaintiff in error the payment of a sum of money he was not bound to pay, but only changed the time of payment, not with additional interest, but on the contrary with a discount of *six per cent. per annum*, upon the whole sum agreed to be paid, from the time the same would have been due and payable, had default not been made in the payment of an installment. The advantage to the mortgagees was the forfeiture, to the mortgagor, at least an equivalent, a discount of *six per cent. per annum* on the whole sum. This is a stronger case for the interposition of equity, than that of the mortgage at *five per cent.* with a clause of reduction to four, if the interest be regularly paid, mentioned in 3 Bl. Comm., 432.

[\*445] \*We think from the authorities cited, from decisions upon the point, from the character of the covenant and the whole instrument, that the condition should not be considered a penalty.

*Per Curiam*.—The decree is affirmed with *one per cent.* damages and costs.

*O. H. Smith*, for the plaintiff.

*J. Rariden*, for the defendants.

(1) Ante, p. 403.

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ADAMS v. LISHER, on Appeal.

*LISHER* sued *Adams* in an action for a malicious prosecution, in causing him to be prosecuted in the District Court of

(506).



## Adamson v. Lamb, Administrator.

the *United States* for cutting timber on the public land. Plea, not guilty. On the trial the Circuit Court, at the plaintiff's request, charged the jury as follows: "That the record of acquittal of *Lisher* in the District Court is *prima facie* evidence of the want of probable cause, and puts the defendant on the proof of probable cause." Verdict and judgment for the plaintiff. The defendant appealed.

*Held*, that *Lisher's* acquittal was not *prima facie* evidence of the want of probable cause for the prosecution against him, and that the instructions to the jury were therefore erroneous. 2 Stark. Ev., 913; 2 Saund. Pl. & Ev., 663; *Inledon v. Berry et al.*, 1 Camp., 203, note; *Purcell v. Macnamara*, 9 East, 361; *Burley v. Bethune*, 5 Taunt., 580 (1).

The judgment was reversed, with costs.

*P. Sweetser* and *W. W. Wick*, for the appellant.

*C. Fletcher* and *H. F. Robison*, for the appellee.

(1) "It is invariably necessary, in an action of this nature (*mal. pros.*), to give some positive evidence, arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge, for, as was observed in the case of *Purcell v. Macnamara*, 9 East, 361, the prosecution may have been commenced and abandoned from the purest and most laudable motives." 2 Stark. Ev., 5th Amer. ed., 493. See *Cummings v. Parks*, 2 Ind., 148.

[\*446] \*ADAMSON v. LAMB, Administrator.

**PAROL GIFT OF REAL ESTATE.**—A gift, by parol, of real estate by *A* to *B*, his son—the donee being in possession and having made improvements—vests in *B* no interest in the property which a court of law or equity can recognize.

**SAME.**—The estate thus held by *B* was, with his consent, sold by *A* to a third person, *A* promising *B* to appropriate a part of the purchase-money to the payment of a note held by him against *B*, and to pay the balance to *B*. The purchase-money being received by *A*, he said that he considered the note paid, and that he would give it up and pay the balance to *B*, but he died without again seeing *B*. *Held*, that these facts were no defense to an action on the note brought against *B* by *A's* administrator.

ERROR to the *Wayne* Circuit Court.

M'KINNEY, J.—*Lamb*, the administrator of *John Adamson*, deceased, brought suit before a justice of the peace against *Simon Adamson*, on a note executed by the latter to the intestate. The defendant filed the following account as an off-set before the justice: “*John Adamson to Simon Adamson, Dr.:* To land bought in the year 1831 (perhaps in the fall), \$100 Credit by off-set with note for forty-five dollars at the same time.” The justice rendered judgment in favor of the defendant for fifty-five dollars. On an appeal to the Circuit Court, the case was submitted to a jury, and judgment rendered on their verdict in favor of the plaintiff for fifty-five dollars and fifty-six cents.

Several errors are alleged to have been committed by the Circuit Court: its refusal to give to the jury certain instructions asked by the defendant constitutes, however, the most important, and is that to which our attention will be directed.

The evidence upon which the instructions were predicated forms a part of the record, from which it appears that, on the trial, the defendant in support of his plea gave in evidence, that the intestate had given to the defendant, his son, a tract of land of which the defendant had possession, and on which he had made improvements, but without having received a title; that the defendant afterwards became indebted to the intestate in the sum of forty-five dollars, the foundation of this suit, and being unable to pay the same, it was agreed that the intestate should sell the land alleged to have been given by him to the

defendant, retain of the proceeds the sum of forty-five [447] dollars, and pay the \*balance to the defendant; that the intestate accordingly sold the land, for which he received \$100, and on receipt of the purchase-money said he considered the note paid, and would give it up and pay to the defendant in money, or other land, the residue of the money he had received; that immediately thereafter, the intestate died without having seen the defendant or given up the note, or paid to him the balance of the purchase-money.

Upon this evidence the defendant moved the Court to instruct the jury, "That if they believed from the evidence, that the intestate sold the land regarding it as the defendant's, though the defendant had no title, and by his, the defendant's, consent, to pay the debt due to the intestate, and to pay the residue of the proceeds to the defendant; and that the intestate sold the land for \$100, and received the money by consent of the defendant, and applied forty-five dollars of it to the payment of the debt for which this suit is brought, declaring it was a payment, and that he would give up the defendant's note, and pay to him the balance of the money; and that the intestate considered the debt paid, and never accounted for any part of the price of the land, it amounts to payment if so considered by the intestate." The Court refused this instruction, but charged the jury, "That it could not amount to a payment at all, there being no valuable consideration passing from the defendant to the intestate for the land."

The defense relied upon by the plaintiff in error, as shown by the record, arises from an alleged parol gift of land by the father to the son, the subsequent sale of the land by the father, by the consent of the son, to pay a debt due by the son to the father, and the father's undertaking to pay the son the difference between the debt due to him and the sum the land would bring.

It appears to be conceded, that the plaintiff in error could not in equity, from the absence of consideration, have enforced a specific performance of the contract for the conveyance of the land; neither could he, at law, have availed himself of such contract as a defense to an action of ejectment, brought by the intestate or his vendee. With this concession, it is difficult to perceive in what manner a change affecting the parties, either legally or equitably, is produced by the consent to the sale of the land. The consent would not impart authority to [\*448] sell, from the fact there was no legal or equitable interest, to pass which the consent was necessary. The sale by the intestate was the mere exercise of his unquestionable right, as the legal owner of the land. No consideration is

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alleged to have passed, either originally or at the period of the sale; and we know of no principal of law that, in the absence of consideration, compels the performance of a naked promise.

If the previous possession of the land, coupled with the improvements made, and the parol gift, would not constitute the intestate a trustee for the conveyance of the legal title, we can not discover how he becomes a trustee for the application of the proceeds of the land, on its sale by consent. This latter position is, however, assumed and relied upon in support of the instructions refused to be given by the Circuit Court. But to this it may be answered, that the constitution of a fund for the payment of a debt, or as the source of pecuniary or other proceeds, can not be valid without a legal or equitable right, neither of which, over the fund in question, was possessed by the plaintiff in error.

The contracts, the first for the conveyance of the land, and the second for the application of its proceeds, rest upon the same foundation; and neither is available from the absence of consideration. The law is considered as settled, that a contract founded on the consideration of blood only, to convey land, would not be sufficient to create a trust or a use under the statute, unless by deed, and, consequently, would not be enforced in equity. The principle is also as well settled, that, independently of the statute of frauds, such contracts are inoperative as well at law as in equity.

We are therefore of the opinion that the Circuit Court was correct in refusing to give the instruction asked, and that in the charge it gave there appears no ground of exception.

*Per Curiam.*—The judgment is affirmed, with *three per cent.* damages and costs.

*J. Rariden and J. S. Newman, for the plaintiff.*

*M. M. Ray, for the defendant.*



## Ingram v. Plasket.

[\*450]

## \*INGRAM v. PLASKET.

**JUSTICE OF THE PEACE—APPEAL—TRANSCRIPT.**—In the case of an appeal, the justice of the peace is bound to file his transcript within the time prescribed by statute, though his fees have not been paid or tendered.

**SAME.**—The defendant against whom a judgment had been rendered by a justice of the peace, appealed to the Circuit Court. The transcript not being filed in time by the justice, the appeal was dismissed; and the appellant sued the justice for his neglect. *Held*, that the plaintiff in this case might prove admissions, made on the trial of the original suit, by the plaintiff there, tending to show that there was no foundation for that suit.

**SAME.**—The justice, in this case, had filed the appeal-bond in the clerk's office after the limited time. *Held*, that the circumstance of his having filed the bond, precluded him from requiring the plaintiff to prove its execution.

**ERROR to the Clark Circuit Court.**

**STEVENS, J.**—The material facts presented by the record in this case are these: *Ingram*, the plaintiff in error, was a justice of the peace, and a certain *H. Smith* and *M. T. Abbott*, doing business under the style and firm of *Smith & Abbott*, brought suit before *Ingram* against *Plasket*, the defendant in error, for certain goods, wares, and merchandise, &c., and recovered a

[\*451] judgment. *Plasket* appealed to the Circuit Court, and entered into an appeal-bond, &c. *Ingram*, the justice of the peace, failed to file in the Circuit Court a transcript of the judgment and proceedings before him, together with the appeal-bond and the papers of the case, within twenty days from the date of the appeal-bond, as by statute he is required to do; by which *Plasket* lost the benefit of his appeal, and was compelled to pay the judgment rendered by the justice, and costs, without a further hearing, &c. For this official misfeasance of *Ingram*, *Plasket* brought this suit; *Ingram* pleaded not guilty, a jury trial was had, and a verdict found for *Plasket*, on which final judgment was rendered.

It appears of record by a bill of exceptions, that although *Ingram* failed to file the transcript, appeal-bond, and papers of the suit, within twenty days after the date of the appeal-bond, yet that he did afterwards file them, and that *Plasket*, on the

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trial of this suit in the Court below, for the purpose of proving that he had regularly taken his appeal, and that the transcript, &c., had not been filed by the justice of the peace, within twenty days after the date of the appeal-bond, offered in evidence the appeal-bond itself, after having proved that the appeal-bond offered was the one which *Ingram*, the justice, had himself filed in the Circuit Court, with the transcript and other papers of the suit. To this appeal-bond there was a subscribing witness, and *Plasket*, after having proved that the subscribing witness did not reside in the State of *Indiana*, offered further to establish the bond by proving the handwriting of the obligors; to this *Ingram* objected, but the objection was overruled, and the handwriting of the obligors was proven, and the bond went to the jury.

It further appears by the bill of exceptions that, on the trial of this case, it was proved that the goods, wares and merchandise for which *Smith & Abbott* sued *Plasket* before the justice, were sold to the wife of *Plasket*, and *Plasket* then offered to prove that *Smith*, on the trial before the justice, had admitted that *Plasket* had forbidden him to sell anything to his wife upon a credit. To the proof of which admissions *Ingram* objected, because *Smith* himself was a competent witness to prove the fact by, and was the best evidence, and should be resorted to, unless some legal reason existed that authorized the introduction of secondary evidence; the objection was, however, overruled, and the admissions of *Smith* were proven.

[\*452] \*To the judgment and proceedings in this case, several objections are raised.

First. It is insisted that the declaration is defective, that the justice of the peace was not bound to file the transcript and papers, unless he was either paid or tendered his fees, and that there is no such averment in the declaration. This exception is not well taken: the statute does not authorize any such construction. The words are, "All justices of the peace, &c., shall be allowed six cents per mile for traveling to file appeal papers in the clerk's office of their respective counties, to be

collected as their other fees." This language is to us plain, clear and conclusive.

Secondly. It is contended that the Court erred in the admission of testimony to prove the acknowledgment of *Smith*, who was himself a competent witness, and might have been used as a witness to prove the same.

It is a settled rule that the best evidence that the nature of the case admits of must be adduced, unless some obstacle lies in the way which legally authorizes a resort to inferior evidence. The highest degree of certainty of which the mind is capable, with respect to the existence of a particular fact, consists in a knowledge of the fact derived from actual perception of the fact by the senses. It is seldom, however, that a jury can act upon knowledge of this description; it rarely happens that a fact which can be decided by mere inspection is submitted to the consideration of a jury. The second degree of evidence in the scale of certainty consists of information derived from the relation and information of those who have had the means of acquiring actual knowledge of the fact, from actual perception of the same by the senses, and upon knowledge thus derived juries must in general act. The jury, in general, must be informed of the facts by those who have been eye and ear witnesses of them. The third degree of evidence in the scale of certainty consists in information derived, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows it only by its having been asserted by some other person; this is generally termed hearsay evidence.

In the common course of life this third species of evidence is usually acted upon without scruple; but, in a Court of justice, it is a general rule that such evidence is not sufficient. [\*453] This \*general rule, however, has several exceptions.

Public documents, made under lawful authority, such as proclamations, public surveys, records, &c., are excepted from this general rule. And, in like manner, where the declaration is, in itself, a fact, and is part of the *res gestæ*, the objection to hearsay ceases. The distinction between a mere

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recital which is not evidence and a declaration which is to be considered as a fact in the transaction, and therefore evidence, frequently occasions much discussion. The rule is this, if the declaration has a tendency to illustrate the question, and any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker, then it is admissible evidence.

Hence it is, that when the nature of a particular act is questioned, a contemporary declaration by the party who does the act, is evidence to explain it. Where, for instance, in cases of bankruptcy, in actions between the assignee and third persons, the question is, with what intent the person declared bankrupt absented himself from his house, his declaration, contemporary with the fact of departure, is evidence to explain that intention. Also, in *Lord George Gordon's Case*, it was held that the cry of the mob might be received in evidence as part of the transaction. In the case of an indictment against a man, as an aider or abettor of the principal, who has committed a felony, the confession of the principal that he committed the act, is *prima facie* evidence against the accessory, that the principal is guilty of the felony charged; and so also is the record of the conviction of the principal, although he pleaded not guilty.

The objection of hearsay evidence, or *res inter alios*, can never operate to the exclusion of any statement of a fact, which the law regards as a proper and safe medium for conveying the truth to a jury; for in such case the evidence is admissible, because it is in itself, and in its connection with the circumstances, deserving of credit, and it is no more *res inter alios* than the fact itself is. And it may be here observed, that such evidence does not rest upon the credit due to the person who makes the statement, but would in general be good, although the person who made it would not, in ordinary cases, be believed upon oath. It is admitted as a part of the transaction, on the presumption that it is calculated to elucidate



[\*454] the \*facts with which it is connected; and being made by the party who transacted the business, and who knew, as explanatory of his own act, without premeditation, as a matter of fact connected with the matter in dispute, and not with a view to affect the party, otherwise than as the actual existence of the fact affects the transaction itself, it is evidence although the party who made it may be himself a competent witness. And notwithstanding it may be a transaction between others, yet as a mere fact, and part of the *res gestæ*, it is evidence. As, for instance, in the case of goods consigned by *A* to *B*, and *C* injures them whilst they are in the hands of the carrier; in an action against *C* for the wrong, by either *A* or *B*, it is competent for the plaintiff to prove his property in the goods by proof of the agreement of the other that the plaintiff was the owner; in such case *C*, the defendant, is not either privy or party to the agreement between *A* and *B*, nor would either *A* or *B* be incompetent to be a witness for the other; yet proof of the agreement is evidence against *C*, not as concluding any right of his without his assent, but as affecting the nature of the transaction itself, and showing to whom the injury was done.

In the case now before us, we think that the admission of *Smith* is a fact so connected with the main transaction itself, as to form a part of it, and is legal evidence to elucidate and explain; and although it is between others, yet it is a part of the *res gestæ* and may go in evidence with the rest of the transaction. It is wholly immaterial whether the admission is true or false, it is binding on *Smith & Abbott*, attaches to their claim, and forms a part of the proceedings before the justice of the peace, and shows that their judgment against *Plasket* was perhaps improperly obtained, and would have been reversed if the appeal had been perfected; and, therefore, may legally be given in evidence with the rest of the transaction in the suit between *Plasket* and *Ingram*, to show the amount of injury *Plasket* sustained by losing the benefit of his appeal. If the admission would be good evidence against *Smith & Abbott*, and could be proved by those who heard the admis-

sion, it is good evidence against *Ingram*, and may be proved in the same way.

The third and last point is, whether the Court erred in permitting the plaintiff to prove the handwriting of the obligor to the bond offered in evidence, before they had produced legal evidence that the handwriting of the [\*455] subscribing witnesses \*could not be proved. The general rule is, if the subscribing witness is out of the State, or is interested, dead, blind, or convicted of an infamous crime, &c., that the handwriting of the witness must be proved if it can be; if it can not be, then the handwriting of the obligor of the bond. And, generally, where the subscribing witness can not be had, the instrument is permitted to go to the jury on the proof of the handwriting of the witness; but the Court may, and it is often done, require proof of the handwriting of the obligor also. *Wallis v. Delancey*, 7 T. R., 262, note; *Hopkins v. De Graffenreid*, 2 Bay, 187; *Oliphant v. Taggart*, 1 Bay, 255; *Clark v. Sanderson*, 3 Binn., 192; *Cooke et al. v. Woodrow*, 5 Cranch, 13.

It appears by the case of *Barnes v. Trompowsky*, 7 T. R., 261, that these rules were originally founded on the notion, that the subscribing witness is agreed upon between the parties to be the only witness to prove the instrument; but Judge *Spencer*, in the case of *Hall v. Phelps*, 2 Johns. Rep., 451, when speaking of this notion, says it is, to speak with all possible delicacy, an absurdity. Latterly, the rule has been placed on the ground that the best evidence should be required that the nature of the case admits of, and that the subscribing witness himself is the best evidence. Lord *Mansfield*, in the case of *Abbot v. Plumbe*, Doug., 216, said that the objection arising from the absence of subscribing witnesses, was a captious one; and Chief Justice *Kent*, in the case of *Jackson v. Burton*, 11 Johns. Rep., 64, observes, that by the rules of practice in the Court, great latitude of discretion is exercised on that point. And, of late, courts have considered the objection arising from the absence of subscribing witnesses, if unaccompanied by any suggestion of fraud, as entitled to less regard than formerly.

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In the case of *Homer v. Wallis*, 11 Mass. Rep., 308, it is decided that the handwriting of the obligor to a promissory note might be proved, if the subscribing witness was out of the State, without proving the handwriting of the subscribing witness. The Court said, that the rule requiring the handwriting of the subscribing witness to be proved only related to instruments that were by law required to be attested by subscribing witnesses to make them valid and binding, such as conveyances of real estate, wills, &c.; but if the writing was valid and binding in law without a subscribing witness, the

witness' handwriting might be waived and not proved [\*456] at all. But in the cases of *\*Doe v. Durnford*, 2 M. & S., 62, and *Higgs v. Dixon*, 2 Stark. Rep., 180, it was held that the rule is inflexible, and applies to all attested writings.

The point under discussion is by no means clear of all doubt, but upon a view of the whole ground connected with the other facts of the case, we think the evidence was correctly admitted. If *Ingram* did, as a justice of the peace, bring the bond in question into the clerk's office, and file it with the transcript and papers of the case, as the appeal-bond by him in that case taken, he was estopped by his own act. He could not deny the making of the bond by the persons whose names were attached as obligors, nor could he require proof of its execution; the bond was good evidence against him without any proof of its execution. That he did so bring the bond and file it among the papers and transcript of the case, as the appeal-bond by him taken, &c., there is no doubt; the record is as to that sufficiently express and certain.

*Per Curiam*.—The judgment is affirmed with costs.

*J. H. Thompson* and *I. Naylor*, for the plaintiff.

*C. Dewey*, for the defendant.

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Wernwag v. Brown and Another.

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[\*457] \*WERNWAG v. BROWN and Another.

DECREE—INTEREST UPON.—A decree determining the amount due on a mortgage, and authorizing a sale of the mortgaged premises, draws interest at the rate of only six *per cent. per annum*, though the debt previously drew interest, according to the contract, at a much higher rate.

SAME.—A decree, in such case, must show with certainty the sum due to the complainant, and not leave the amount to be afterwards ascertained by the calculations of any ministerial officer.

ERROR to the *Marion* Circuit Court.

M'KINNEY, J.—This is a bill in chancery to foreclose a mortgage brought by *Brown & Morrison* against *Wernwag*. A demurrer was filed to the bill, which we think was correctly overruled by the Circuit Court. That Court rendered a decree in favour of the complainants.

The principal and only question to be decided is presented by the first error assigned, which is as follows: "There is no sum decreed to be paid, but the amount is left open for the clerk or sheriff finally to decree the amount due at the time of sale, so that exorbitant interest may be calculated to that time." The record shows that the mortgage was executed to secure the payment of several sums of money due by judgments, notes, &c., upon a part of which due by notes, interest was agreed to be paid at the rate of twenty-five *per cent. per annum*, and upon one note for \$319.49, the sum of twelve dollars per month was agreed to be paid. The Circuit Court decreed, "That the amount of the several notes, judgments and securities mentioned in the said bill of complaint, and the conditions of said mortgages respectively, or so much thereof as may then be due and owing to the said complainants by the said *William H. Wernwag*, together with all interest, and the costs of this suit, and all costs on the judgments enumerated in the said bill of complaint, be paid to the said complainants on or before the 1st day of *January* next, and in default," &c.

This decree is radically defective: 1. Because it gives to the mortgagees interest at the stipulated rate to the 1st day of



*January* next ensuing its rendition, the day on which the money is decreed to be paid; and 2. Because it leaves [\*458] the sum \*to be paid to be decided by the clerk or sheriff without the action of the Court.

1. The case of *Miller v. Burroughs*, 4 Johns. C. R., 436, settles the first point, that after a decree the original contract is merged, and from that time the sum decreed draws only the legal rate of interest. So that in the case before us, although by statute the higher rate of interest agreed to be paid was recoverable by the decree (1), yet after its rendition, interest at the rate of six *per cent. per annum* only should have been given. It appears by the record that the term at which this decree was rendered was held in the month of *September*, and interest as stipulated by the contract was given to the 1st day of *January* ensuing. This was clearly erroneous.

2. A decree, as a judgment, should show on its face what the Court has decided, and in *Honore v. Colmesnil*, 1 J. J. Marsh., 525, and *Stagner v. Fox*, Id., 556, it is laid down that a reference to the evidence filed, or to other records, &c., can not be tolerated, and that no execution can issue on such a decree or judgment. The same principles are settled in *Bonta v. Clay*, 1 Litt. R., 27; *Farmer et al. v. Samuel*, 4 Litt. R., 187; and *Griffith v. Depew*, 3 Marsh. R., 177. In the first of these cases, it is said that the decree or judgment should be certain and definite, and that nothing should be left to the clerk to ascertain or sum up by reference to other parts of the record, and if it be not so, no execution can be issued by the order of the Court or otherwise. These cases are illustrative of the settled rules in chancery practice, and are deeply founded in reason, and the respective duties of the Court, and its ministerial officer. The duty of a Court, either of law or equity, is to pronounce the law applicable to the facts presented; that of the clerk, to record the sentence of the Court. The duties of the one are distinct from those of the other, and the correction, by the clerk, of errors committed by the Court, would invest the ministerial officer with the duties and responsibilities of the judicial.

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M'Clelland v. Quarles, Assignee, in Error.

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*Per Curiam*.—The decree is reversed, with costs. Cause remanded, &c.

*C. Fletcher* and *W. Quarles*, for the plaintiff.

*J. Morrison*, for the defendant.

(1) *Vide* Stat. 1833, p. 43. Note to *Harvey v. Crawford*, Vol. 2 of these Rep., 43.

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[\*459] \*M'CLELLAND v. QUARLES, Assignee, in Error.

QUARLES sued M'Clelland before a justice of the peace on a note payable to *Saunders*, without any assignment of the note by the payee. The defendant pleaded—1. That he resided in *W.* township, and not in the township in which the suit was commenced, &c., and that there were justices resident in *W.* township; 2. That the payee, in consideration that the defendant would pay him a certain sum, agreed to forbear to sue for a certain time, &c.; 3. That another suit was pending on the note, &c. Judgment by the justice for the plaintiff.

Appeal to the Circuit Court. The pleas, on the plaintiff's motion, were rejected. The defendant then offered to prove under the general issue (the benefit of that plea being given to him by the statute, though it was not filed), the payee's agreement to forbear, &c., as stated in the rejected plea, and also payment of the consideration to forbear, &c. This evidence was rejected. Judgment, on the appeal, for the plaintiff.

Objections made to the pleas, viz.: To the first, Because it did not aver that there was a justice in *W.* township not related to either of the parties: To the second, Because it did not aver payment of the consideration for forbearance: To the third, Because it did not aver that the suit pending was between the same parties.

*Held*, that the objections to the pleas would have been good, had they been made before the justice; but not having been there made, the objections were waived. *Held*, also, that the

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Newland v. Nees.

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evidence of the agreement to forbear, &c., should have been admitted. *Held*, also, that the want of the payee's assignment of the note was a fatal objection to the suit.

The judgment was reversed with costs.

*J. B. Ray*, for the plaintiff.

*C. Fletcher*, for the defendant.

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[\*460]

\*NEWLAND v. NEES.

**JUSTICE OF THE PEACE—JURISDICTION.**—A magistrate may have jurisdiction of a suit, though the plaintiff's account exceed \$100, if it be reduced by credits below that sum, and the balance only be demanded.

**ERROR** to the *Union* Circuit Court.

**BLACKFORD, J.**—Assumpsit by *Newland* against *Nees* before a justice of the peace. The plaintiff's demand was on an account amounting to \$176, but which account he had reduced by credits to a sum under \$100. The justice gave judgment in favour of the plaintiff for \$45. The Circuit Court, on appeal by the defendant, dismissed the cause. The ground of dismissal was, that as the whole amount of the debit side of the plaintiff's account exceeded \$100, the justice had no jurisdiction of the cause.

This judgment must be reversed. The statute says, that "in all actions of debt or assumpsit wherein the sum due or demanded shall be over fifty dollars, and not exceed \$100, exclusive of interest and costs, justices and circuit courts shall have concurrent jurisdiction." R. C. 1831, p. 297. The case before us was an action of assumpsit, and the sum demanded by the plaintiff, as due to him from the defendant, was less than \$100. We think the cause is within the statute.

*Per Curiam.*—The judgment is reversed, with costs. Cause remanded, &c.

*O. H. Smith*, for the plaintiff.

*J. Rariden* and *M. M. Ray*, for the defendant.

## HENDERSON v. BATES and Others.

CHANCERY JURISDICTION—INJUNCTION.—Several executions in favour of different persons, were levied on certain personal property as belonging to *A*, the execution-defendant. *B* claiming the property levied on to be his, filed a bill in chancery to obtain an injunction, and for general relief. *Held*, on demurrer, that the bill could not be sustained; the complainant's remedy being at law and not in equity.

[\*461] \*APPEAL from the *Marion* Circuit Court.

*Henderson* filed a bill in chancery against *Town* and others. The material allegations in the bill are as follows: The complainant, in *January*, 1832, leased his tavern-house in *Indianapolis* to *Town* for the term of five years, at the annual rent of \$500; and *McCarty*, *Blythe* and *Bradley*, were the lessee's sureties in the lease. About the same time, the complainant made a separate contract with *Town*, by which he agreed to sell him certain household and kitchen furniture for the sum of \$1,190.28; which furniture was left by the complainant in *Town's* possession in the tavern-house, and was to be the property of *Town* when he should execute, within a reasonable time, notes with approved surety for the amount, payable in five equal annual installments. *Town* occupied the tavern-house until *August*, 1832, without having given the notes and surety for the furniture, and which furniture, consequently, continued to be the complainant's property.

In *August*, 1832, *Town* entered into partnership in keeping the tavern with *Pulliam*, and transferred one-half of his own personal property to *Pulliam*; not including in the transfer the furniture aforesaid belonging to the complainant. The tavern-house was occupied by *Town & Pulliam* until *November*, 1832; the complainant's said furniture remaining in their possession in the house. At this time *Town* became insolvent, and, to indemnify his sureties, above mentioned, for their liability to the complainant for the rent and damages, &c., *Town & Pulliam* delivered to them possession of the tavern-house, and *Town* transferred to them his personal property on the premises, and



his interest in that held by him in partnership with *Pulliam*. The lease for the house was transferred to *Town's* sureties with the complainant's consent, and the rent then due was about \$400. *Town* not only failed to comply with his contract, as to the furniture which he received from the complainant, but he carried away and destroyed a large portion of it, injured the tavern-house, &c. On the 23d of *November*, 1832, *Town's* sureties transferred to the complainant, in discharge of their liability, the tavern-house and property received by them as aforesaid.

The lease, inventories, transfers, &c., are made a part of the bill.

*Town*, after the said transfer to his sureties, being [\*462] indebted \*to various persons, fraudulently confessed judgments in their favour for their respective claims. (These judgments, between twenty and thirty, and in favour of nearly as many creditors, are here set out.) At the same time, *Town & Pulliam* confessed several judgments in favour of their creditors. (These judgments, also, are here set out.) Executions on the judgments against *Town*, and against *Town & Pulliam*, were issued and put into the hands of two constables, and were levied indiscriminately on the furniture of the complainant delivered to *Town* as aforesaid, on the property transferred to *Town's* sureties, and on that of *Town & Pulliam*; and the property thus levied on was advertised for sale by the officers.

*Pulliam* is required to set forth the partnership transactions, &c., and *Town*, *Town & Pulliam*, and the execution-plaintiffs, are made defendants. The bill prays for an injunction against the further proceedings of the execution-creditors and the officers, and for general relief.

*Pulliam* filed his answer, confessing the allegations in the bill so far as his knowledge extended, and filed interrogatories in the nature of a cross-bill. *Town* made no answer, and the bill was demurred to by the execution-plaintiffs. The causes of demurrer were: 1. That the complainant claimed the property levied on as his own, and his remedy was therefore at

law; 2. That the charging *Town* with fraudulently procuring goods on credit, &c., committing waste, &c., and the requiring *Town* and *Town & Pulliam* to answer, &c., are attempts to join in the bill several matters of different natures against several defendants. The demurrer was sustained, the injunction which had been granted in vacation was dissolved, and the bill, as to the execution-plaintiffs, dismissed. A motion by *Pulliam* for an answer to his cross-bill was overruled, and his cross-bill considered as dismissed.

M'KINNEY, J., after giving a statement of the case, proceeded as follows:

The principal question to be settled in this case is, Does the bill of *Henderson* show that he is without relief at law, and that a court of equity should interpose? The complainant contends that the case presented by the bill is peculiarly appropriate to a court of equity, and in support of his position assumes several grounds, each of which in the course of this examination will be noticed. The object of the bill is to protect from sale certain personal property, levied on [\*463] by executions against *Town*, \*and against *Town & Pulliam*. A part of this property is claimed by *Henderson*, by a transfer made to him by the sureties of *Town*, and the residue is claimed on original ownership, and a denial of the divestment of his right by the possession of *Town*, and of *Town & Pulliam*.

The rule is well settled that relief will not be granted in chancery when, at law, a complete remedy is afforded. 3 Atk., 740; 3 Bro. Parl. Cas., 525; Mitf. Pl., 111; *Cunningham v. Caldwell*, Hard., 123; *Waggoner's Trustees v. M'Kinney et al.*, 1 Marsh. R., 479.

It is also as well settled that chancery will not entertain a bill when personal property is the subject-matter, unless in some peculiar cases; nor will it interpose and enjoin the sale of personal property, taken in execution, either on the ground that it is not the property of the defendant in the execution, but belongs to a third person, or that it belongs to the com-

plainant, unless it be shown that if the property were sold the complainant would be without remedy at law. *Nesmieth v. Bowler*, 3 Bibb, 487; *Kendrick v. Arnold*, 4 Bibb, 235.

The remedy at law must not only be incomplete, but the damages not an adequate compensation, to authorize a Court of equity to interpose. In the case of *Bowyer v. Creigh*, 3 Rand. Rep., 25, the question of jurisdiction is fully examined, and the position sustained, that equity interferes in no case where the plaintiff claims as encumbrancer merely, and, where he claims as owner, only in those cases where, from the peculiar nature of the property and circumstances of the case, the remedy at law is incomplete. In the cases of *Wilson v. Butler*, 3 Munf. Rep., 559, *Scott et ux. v. Halliday*, 5 Id., 103, and *Sampson v. Bryce*, 5 Id., 175, in which equity exercised jurisdiction, the plaintiff claimed the property, not as security for money, but as belonging of right to himself, and this property was slaves; for this property being capable of possessing moral qualities, and thus rendered invaluable, it was considered that damages would not be an adequate compensation. The Court in *Bowyer v. Creigh* review the grounds of chancery jurisdiction, and among others, present the following: "Where, pending a litigation, the property in dispute is in danger of being lost, and the powers of the court in which the controversy depends are insufficient for the purpose, equity will interpose to preserve it." "Equity exercises a jurisdiction to put an end to the \*oppression of repeated [\*464] litigations, after satisfactory determinations of the question, upon the principle *interest reipublicæ ut sit finis litium*." It would thus seem that, in cases of personal property, the interposition of a court of equity is rare, and only occurs when the legal remedy is incomplete, and damages are not an adequate compensation. The case in 3 P. Wms., 390, of the ancient silver altar piece, in 1 Vern., 273, of the horn by which an estate was held, in 3 Ves., 70, of the silver tobacco box belonging to a club and some others, and in *Virginia*, of slaves, are examples of such interference afforded by the books, and show that in those cases the remedy at law was incomplete.

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Those cases rest upon their own peculiar grounds, and do not affect the rule laid down.

It is, however, said that this is a bill of peace, thus giving jurisdiction to a court of chancery, and therefore the injunction was correctly granted, and should not have been dissolved. As this position was strongly urged, it would seem to require particular examination. Maddock, in 1 vol., p. 166, says, "Bills of peace are made use of where a person has a right which may be controverted by various persons, at different times, and by different actions, and the Court will thereupon prevent a multiplicity of suits by directing an issue to determine the right, and ultimately an injunction. Another occasion where a bill of this kind is resorted to is, where there have been repeated attempts to litigate the same question by ejection and repeated and satisfactory trials, in which cases the Court, upon such a bill, preferred by all the parties interested, or by some of them in the names of themselves and the rest, will grant a perpetual injunction to restrain further litigation."

The examples and authorities referred to by Maddock show the kind of right to which the text applies. It is that which exists between lords of manors and their tenants, and between tenants of one manor and another. *Mayor of York v. Pilkington*, 1 Atk., 282; *Ld. Tenham v. Herbert*, 2 Atk., 483. Such bills also lie for duties, as in the case of the *City of London v. Perkins*, where the city of London brought only a few persons before the Court, who dealt in those things whereof the duty was claimed, to establish a right to it. 1 Harr. C., 127. "Where a bill was brought by one tenant of a manor, suggesting a custom for the tenants of the manor of A (of which he was one), to cut turves in the manor of B to quiet [465] him, and to have an issue directed as to the right, the Court said, 'this bill is improper and inconsistent with the nature and end of a bill of peace, which is, that where several persons having the same right are disturbed, on application to the Court to prevent expense and multiplicity of suits, issues will be directed, and one or two determinations will establish the right of all parties concerned, on the foot of



one common interest, and the bill is preferred by all the parties interested, or a determinate number in the name of themselves and the rest; but in this case one only brings the bill on the general right, and not on the foot of any particular right,' and therefore the bill was dismissed with costs." 1 Madd., 172. So a bill of this kind, after five trials in ejectment, and verdicts in all of them, has been entertained, and a perpetual injunction granted. *Ld. Bath v. Sherwin*, Pr. Ch., 261.

In the cases in which, to prevent a multiplicity of suits, chancery has entertained jurisdiction, the plaintiff ought to establish his right by a determination of a court of law in his favour, before his bill in equity. Mitf. Pl., 128.

The case of the *Trustees of Huntington v. Nicoll*, 3 Johns. R., 566, has been cited by the complainant as sustaining the bill. Between that case and the present, little if any analogy is perceived. In that case several actions of trespass were brought, and the subject-matter was land. A verdict in one case was found, and the other cases were ready for trial, and from the nature of the respective claims, litigation would not have been arrested by the suits then pending. The jurisdiction of equity, in that case, was founded on one verdict, the pendency of several actions, the liability to others, the great expense attending those actions, and from the case being within the rule laid down in *Tenham v. Herbert*, 2. Atk., 483, that there were some cases in which a man, by a bill of peace, might come into chancery before his right was established at law. The distinction was applied to disputes between lords of manors and their tenants, and between the tenants of one manor and another. The Court in *New York*, even with this distinction, was, however, divided as to the jurisdiction.

From this view of the law, the bill before us is not entitled to the character of a bill of peace, and cannot be regarded as one.

It is further urged by the complainant that equity will, pending litigation, where property, the subject of [\*466] litigation, is in \*danger of being lost, interpose and preserve it. This is unquestionably a ground of

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jurisdiction, as previously noticed, but it is obviously not presented by the case before us. The litigation pending, such as required, cannot be supposed to apply to the present case, and the record does not furnish evidence of any other. This suit does not constitute such pending litigation, for our courts of chancery are fully competent to make all necessary orders, and to adopt effective means for the preservation of property, the subject of litigation in them. The litigation is such as is pending in some other court, whose powers are unequal to that object.

Another ground is assumed; that the transfer by *Town* to his sureties amounted to a mortgage or security to indemnify them against their liability to the complainant, and that the transfer by the sureties to the complainant did not change the nature of that transaction, and that, consequently, the complainant should enjoy all the advantages of a mortgagee, and be entitled to relief in a court of equity.

To this position two objections arise: 1. It does not appear that the transfer was a mortgage, or in the nature of a mortgage; 2. That if it were a mortgage, the conclusion of jurisdiction would not follow.

The bill does not aver that the transfer was conditional, and on its face it is absolute. There is no averment that a defeasance was executed, qualifying the transfer, and no instrument of that kind is made an exhibit. We are referred to *Crumbaugh v. Smock*, 1 Blackf., 305. That case scarcely has a feature resembling the one before us. That was a suit in equity to foreclose the equity of redemption in a lot in *Indianapolis*. The assignment of the certificate for the lot was absolute, but the assignee, on the same day, executed to the assignor a bond binding himself to reassign the certificate on payment of the money lent with interest. The assignment under these circumstances was considered as a security in the nature of a mortgage.

The second objection would seem to be fully answered by turning to the case of *Bowyer v. Creigh*, 3 Rand. Rep., 25. That case was as follows: *Caldwell* being deeply indebted,

and suits depending against him for a great amount, on which it was known judgments would go against him in the following May, executed in April, 1820, a deed of trust to John [\*467] B. Caldwell \*for the security of a debt due to Bowyer, conveying a tract of land in Ohio, and all his personal property. The creditors obtained judgments, and had executions levied on a part of the property conveyed to the trustee. The trustee and the *cestui que trust* filed a bill of injunction to stop the sale, claiming the property as a security for their debt. The injunction was dissolved, and the Court held that a court of chancery had no jurisdiction, because the law gave complete remedy. The other cases cited during this examination, all go to establish the same doctrine.

These are the most prominent positions taken to sustain the bill, and are obviously insufficient.

The case presented shows a struggle between Town and his sureties, and between Henderson and Town & Pulliam and the creditors of the latter; and as the case is not one in which chancery has jurisdiction, and as the dismissal of the bill does not prejudice the rights of the respective parties, we think the Circuit Court was correct in dissolving the injunction and dismissing the bill, not only of Henderson, but of Pulliam. The complainant, if his case was proper for a court of chancery, has made unnecessary parties, and parties also, who, from the showing of the bill, were unconnected with the principal transaction. Entertaining this view, a majority of the Court consider it unnecessary to enter into a particular examination of the bill, or to express an opinion of the claim asserted by Henderson.

STEVENS, J.—In this case I am compelled to dissent from the Court. This I do with great reluctance and due deference, being well aware that the judge who dissents must be, and always is, presumed to be in the wrong. But not being willing to shrink from anything that in my humble and weak opinion appears to be my duty, I shall, in as few words as I can, give my views of the case. [A statement of the case is here given.]

The question before this Court is, Whether the demurrer to the bill was correctly disposed of?

I will dispose of the last assigned cause of demurrer first. As it respects so much of the last cause of demurrer as relates to the improper joinder of *Town*, and *Town & Pulliam*, as defendants, there is no error; the bill is good as to that. They may correctly be made defendants, although the bill might, perhaps, be sufficient without them. The claim of [\*468] the complainant to \*the goods in question, and the rights of the other defendants under their several executions, are such as, at least indirectly, connect *Town* and *Town & Pulliam* with the transaction; and the complainant might or might not make them defendants, at his pleasure. As to the other branch of that objection, it is different. All that part of the bill which relates to the fraudulent conduct of *Town*, unconnected with his dealings with those other defendants, in contracting said debts, confessing said judgments, issuing said executions, and making the levy on said goods, is entirely irrelevant to the rights and interests at issue between the complainant and these defendants, and cannot be joined. This, however, does not vitiate the bill as to these defendants; the whole of those statements and everything connected with them are mere surplusage, and might be stricken out. It in no way affects the complainant's right to the goods, nor the interests of these defendants under their executions. Those statements form no part of the *gravamen* of the complainant's complaint.

The first cause of demurrer is of more importance; it presents some difficulty, and is not, perhaps, clear of doubt.

It is a general principle, clear of doubt or uncertainty, that where a party has a complete remedy at law, equity has no jurisdiction. But to that general rule there are numerous exceptions, all well known to the books and to every lawyer. To oust the jurisdiction of equity, the remedy at law must not only in general terms be complete, but it must be in all things equally complete, effective and salutary.

This is a bill in the nature of a bill of peace, to settle a



right and to prevent a multiplicity of suits at law. The complainant is in possession of these goods, and claims \$1,190.28 worth of them as his own, and the remainder as mortgaged to secure the payment of \$400 certain rent, besides an uncertain sum in damages. These execution-plaintiffs, who have levied on and seized those goods, consist of twenty-seven distinct and different firms and individual creditors, claiming under twenty-seven separate and distinct interests and judgments, &c.; and to settle this controversy by suits at law there must be twenty-seven separate and distinct suits. And again, these twenty-seven several execution-plaintiffs may select their own time when they will have the right to these goods tried; they may release their present levies and levy again when it [\*469] \*suits them; there is no power in a court of law to compel a final settlement of all these claims with one suit, or at one time.

A bill of peace, say the books, may be made use of when a person has a right which may be controverted by different persons in different suits, or where it may be controverted by the same person at different times, and in such cases courts of equity will interfere for the sake of peace, and to prevent a multiplicity of law suits. 1 Madd., under that head; *Devonsher v. Newenham*, 2 Sch. & Lef., 208. In the case of *Tenham v. Herbert*, 2 Atk., 483, Lord *Hardwicke* says, it is certain where a man sets up a right in himself, and where the persons who controvert it with him are numerous, and he can not, by one or two actions at law, quiet the right of each separate claimant, he may come into equity, and that Court will direct an issue to determine the right, and that determination shall be made to determine the rights of all. In Mitford's Pl., 147, it is said by that great man, Lord *Redesdale*, that a demurrer to a bill will not lie for joining distinct claims in one bill, if the complainant claim one general right, which is controverted by several defendants, for he is entitled to have such a bill. In the case of *Elridge v. Hill*, 2 Johns. Ch. Rep., 281, it is said that a bill of peace will be allowed where the persons who controvert the title of the plaintiff are so numerous as to render

an issue in chancery proper to save a multiplicity of suits at law. In the case of *Huntington v. Nicoll*, 3 Johns. Rep., 595, Judge *Spencer* says, that where the complainant claims under one general right, which is controverted by several distinct persons, and where each suit would only determine the individual right in question in that suit, equity has jurisdiction in order to put an end to oppression or to a multiplicity of suits.

From this view of the authorities and the reason, I am satisfied that the complainant is entitled to the benefit of his bill, and that the demurrer should have been overruled.

There is, however, another view which may be taken as to part of this case. It appears to be a matter of controversy between the parties, whether the complainant holds the goods he received from the sureties of *Town* under an absolute purchase and sale, or under a mortgage. The defendants contend that the sale and delivery by *Town* to his sureties were absolute and not by way of a mortgage; that the instrument of writing

conveying them is an absolute bill of sale, and not a [\*470] mortgage; and \*that the sureties in like manner sold them absolutely to the complainant. The complainant would seem to insist, that the instrument of writing conveying them is a mortgage, and not an absolute bill of sale. Which of these parties is correct, is a matter entire immaterial in deciding upon the demurrer. If the sale by *Town* to his sureties was absolute, and the sale by the sureties to the complainant absolute likewise, then the goods absolutely belong to the complainant, and stand upon the same footing with the other goods in dispute. But if they are held under a mortgage, the state of the title may perhaps be somewhat different, but the case as to this demurrer is not changed. A mortgage is a conveyance by the mortgagor of his title and interest in the goods to the mortgagee, and it becomes an absolute interest at law if not redeemed at the appointed time; and in cases of a mortgage on goods and chattels, the equity of redemption of the mortgagor is not subject to be seized and sold on execution; the only relief the creditor has is by a bill in equity. If then

the complainant holds under a mortgage, the parties are in the right court.

The case of *Bowyer v. Creigh*, 3 Rand., 25, is much relied on to sustain the demurrer to the bill in this case. That case is totally unlike the case now before us in its facts, and also in the law that governed the decision of the Court. The Court, in that case, bottomed their decision on three distinct and specific facts, neither of which exists in this case. The first point made by the Court in that case was, that the main and principal fact in the bill was untrue. Now, there is nothing like that can come under consideration in the decision of this demurrer; the facts of the bill are taken to be true—at least they cannot be taken to be false. The second point made by the Court in that case was, that it was clear and palpable that the deed under which the complainant claimed was made for the express purpose of cheating, defrauding, and hindering creditors. No such thing appears in this case; no evidence has been taken, nor is there anything in the record that even raises such a suspicion. And the third and last point made by the Court in that case was, that the complainant had, under the *Virginia* laws and practice, complete and ample remedy at law in one single action. The Court details and shows the proceedings under the *Virginia* laws, by which the complainant in that case could have had complete remedy at law, in a [\*471] single suit; but we have \*no such law or practice.

There is, then, nothing in that case that in the least conflicts with this opinion.

The judge, however, in his argument upon general rules and principles says, that in no case can a claimant who claims as a mere incumbrancer, go into a court of equity. It is at least doubtful what his honor means, and therefore it is hard to know whether he is sustained by the books or not. One thing however is certain, if he means that the equity of redemption in mortgaged goods and chattels can be seized and sold on execution, he is in direct conflict with the highest authorities; the relief in such cases is by a bill in equity, at least so say the books.

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Bouche v. Ryan, in Error.

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As to the cross-bill of *Pulliam*, one of the defendants, about which something has been said, it is only necessary to say that it was correctly dismissed; it cannot be coupled with this suit; the interests and issues under this bill being in all things distinct, and unconnected with the interests put in issue by that cross-bill.

Before closing, it is proper that I should notice an objection which was urged in argument. It was said that courts of chancery should always lean strongly against withdrawing the trial of such cases as these from a court of law. In answer to that, it is only necessary to say that bills of this character do not interfere with the mode of trial. It is a proceeding to prevent a multiplicity of trials on the precise same titles; to prevent the complainant from being unnecessarily vexed and harrassed when he is willing to put an end to the litigation by a fair legal adjudication; a proceeding to prevent unnecessary delay, doubt, and expense, and put a final quietus on the controversy. A single issue is made up which embraces the whole merits, and is sent to a court of law for trial, the event of which all the parties are compelled to abide. All the parties litigant are parties to the trial of that issue, and the chancellor may grant as many new trials of that issue as he thinks justice requires, if there is any proper ground for dissatisfaction or good cause for a new trial: hence that objection is wholly groundless.

*Per Curiam*.—The decree is affirmed, with costs.

*W. W. Wick* and *C. Fletcher*, for the appellant.

*J. Morrison* and *H. Brown*, for the appellees.

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BOUCHE v. RYAN, in Error.

IF the plaintiff is an infant, the form of the writ may be the same as in other cases, but the declaration must be by guardian or next friend (1).



## Ennis v. Waller.

A defendant, by obliging the plaintiff to give security for costs, does not waive the right to plead the infancy of the plaintiff in abatement.

An infant plaintiff is not liable for costs. 1 Tidd, 72.

(1) Vide note (4) to *Findley v. Buchanan*, Vol. 1, of these Rep., 13; *Shirley v. Hagar*, Ante, p. 225.

## ENNIS v. WALLER.

JUDICIAL SALES—SUIT FOR PURCHASE-MONEY.—In an action by a sheriff for the purchase-money of land sold by him on execution, the judgment and proceedings on which the execution issued, must be averred in the declaration and proved on the trial.

SAME.—In such an action, the sheriff's return to the execution must be stated in the declaration.

SAME—STATUTE OF FRAUDS.—Sheriffs' sales of real estate are within the statute of frauds (a).

APPEAL from the *Daviess* Circuit Court.

STEVENS, J.—*Waller*, as sheriff, &c., declared against *Ennis* in an action of assumpsit. The declaration originally contained four counts, but the third and fourth counts are not now before the Court, having been finally disposed of in the Court below on demurrer.

The allegations in the first two counts are in substance as follows: That *Waller*, the plaintiff, was sheriff, &c.; that on the 5th day of *October*, 1831, a writ of *venditioni exponas* issued, &c., directed to him as such sheriff, commanding him to sell certain lands, &c., described and set out in the writ, which lands, it was recited in the writ, had been levied on by a writ of *feri facias* to satisfy a judgment in the Circuit Court of the county of *Martin*, in favour of *Elizabeth Shelmire* against *Frederick Sholts* and others, for the sum of [\*473] \$756.41 \*debt and twenty-three dollars and twenty-one cents costs; that said writ of *venditioni exponas* duly came to his hands, and in pursuance of its commands he

(a) *Hunt v. Gregg*, 8 Blackf., 105.

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legally sold said lands under said writ, and that the said *Ennis*, the defendant, became the purchaser of part of those lands, that is, a certain quarter section of land which is described by its numbers, &c., for the sum of \$350; that he then and there, with the knowledge and consent of *Ennis*, endorsed on said writ that he had sold the said quarter section of land to him, the said *Ennis*, for the sum of \$350; and that he shortly afterwards made, executed and tendered to him, the said *Ennis*, the proper and legal conveyance, but he refused to take it, and also refused to pay the purchase-money, &c. *Ennis*, the defendant, pleaded three several pleas; 1st, *Non-assumpsit*; and secondly and thirdly, special pleas in bar. The special pleas were demurred to and the demurrers sustained by the Court; upon the plea of *non-assumpsit*, issue was joined, a jury trial had, and a verdict and judgment rendered for the plaintiff.

The whole of the evidence given by the plaintiff to the jury is spread upon the record by a bill of exceptions, by which it appears that no evidence went to the jury of any judgment, record or proceeding anterior to the writ of *venditioni exponas*. The writ of *venditioni exponas*, and the proceedings of the sheriff on that writ, constitute the whole of the evidence given.

It appears, also, by a bill of exceptions, that the defendant asked the Court to instruct the jury that the contract and sale were within the statute of frauds, being a sale of lands, and that unless the agreement or some memorandum thereof was in writing, the action could not be sustained. He also asked the Court to further instruct the jury that the plaintiff could not recover unless he produced the record, or legal evidence of the record, of the judgment and proceedings on which the writ under which he claimed is bottomed. Both of these instructions the Court refused.

Various other exceptions and objections appear of record, and several other weighty points are urged upon this Court for consideration, but they have not been sufficiently examined to decide upon them, such decision being considered unnecessary in this case. This opinion is confined to the objections arising out of what is already above stated.

[\*474] \*The first question is, were the demurrers to the defendant's pleas correctly sustained?

The pleas are obviously insufficient, and the demurrers to them would be well taken if the plaintiff had a sufficient declaration. His declaration, however, is radically defective, and therefore he can not complain of the insufficiency of the pleas: although the pleas may be a nullity, yet the plaintiff is not entitled to a judgment, and no default of the defendant in his pleadings can enable him to recover; hence the Court erred in sustaining the demurrers.

The plaintiff claims to recover by virtue of an official sale made by him as sheriff, &c., under a writ of *venditioni exponas*, and if those proceedings do not vest in him a legal cause of action, he must go out of Court. Now, this writ of *venditioni exponas*, as well as all the proceedings of the sheriff under it, are null and void, and give no legal cause of action, unless there were remaining of record, unpaid, unreversed, and in full force, just such a judgment, and such proceedings as are recited in said writ, and before the plaintiff can recover he must show upon the face of his declaration, by special and substantive averments, the existence of these facts. *Ennis* is a stranger to the judgment and proceedings, and is not presumed to be cognizant, in any way, of them, and has a right to traverse the facts.

Again, the plaintiff should have shown and alleged in his declaration the substance, tenor and effect of the return he made, as sheriff, to the writ on which he avers he made his sale. His right to recover the purchase-money in his own name depends, to a great extent, upon that return. The defendant, *Ennis*, bid off the land, but refused to pay the money, and, under that state of facts, the sheriff was not bound to make himself liable for the money; he might, if he chose so to do, have returned that the property remained on hand unsold for want of buyers; and if he did so return, he has no cause of action or demand against the purchaser for the purchase-money. He avers that he did, "with the knowledge and consent of the defendant, endorse on the writ that he had

sold said quarter section of land to him for the sum of \$350," but he does not say that he made any such return. Under the circumstances of the case, he could only make one of two returns. He either returned that the property [\*475] remained on hand unsold \*for want of buyers, or that he had made the sum of \$350 by the sale of said land to the defendant, *Ennis*. Now, which did he do? It is material to know; but his declaration is silent. This sale was made by the sheriff in the month of *November*, 1831, after the repeal of the 7th section of the act of the 20th of *January*, 1826, entitled an act amendatory of the law, &c., and before the passage of the act of the 2d of *February*, 1833, amending the act subjecting real and personal estate to execution, and therefore it must be governed by general principles, without the aid of those enactments. It may, however, be remarked that the case is not brought within either the letter or meaning of either of those enactments, and could not be helped out by them were they in force.

The next question is, should the Court have instructed the jury that the plaintiff could not legally recover, unless he produced the record, or legal evidence of the record, of the judgment and proceedings on which the writ of *venditioni exponas* was bottomed?

This is determined in the affirmative in that part of this opinion which relates to the allegation of the same facts in the declaration. Allegations and proofs must always agree. If it were material to aver those facts, it was also material to prove them; and if they ought to have been proved, they should have first been stated, in a traversable form and manner, in the declaration; the Court, in refusing this instruction, committed again, in part, the same error it had committed in sustaining the demurrers to the pleas.

The next and last question is, should the Court have instructed the jury that the sales of a sheriff, by him made as sheriff, under a writ of execution founded upon a judicial judgment of a Circuit Court, are within the statute of frauds?

This is a question about which there may, perhaps, be some



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diversity of opinions. Lord *Hardwicke*, in the case of *The Attorney General v. Day*, 1 Ves. sen., 218, said that a judicial sale before a master in chancery was not within the statute of frauds; but the case in which he made the remark is very obscurely reported, and it would seem rather to have been a consent of parties made in open Court, entered upon the record, and confirmed by the Court. It is also laid down in general terms, by several law writers, that judicial sales before a master in chancery are not within the statute of frauds. [\*476] These *dicta*, it is \*found, are all bottomed on the *dictum* of Lord *Hardwicke*; but neither his lordship, nor any of his copiers, has favoured us with any satisfactory reason why it is so, and, indeed, it is not easy to comprehend the reason. It can not be because they are sales at auction, for it is settled, without a dissenting *dictum*, that sales at auction are as much within the statute as any other sales. And in the sale of either goods and chattels, or lands, it is now well settled that the auctioneer is an agent for both the vendor and vendee, and that his memorandum in writing of the bargain and sale will satisfy the statute, if it contain a full and sufficient contract, and is signed by the auctioneer; that is, if it contain the parties' names, a full and sufficient description of the land, commodity, or thing sold, the price given, and the time and terms of payment. *Simon v. Motivos*, 3 Burr. Rep., 1921; 1 Bl. Rep., 599; *Hinde v. Whitehouse*, 7 East, 558; *Heyman v. Neale*, 2 Campb. Rep., 337; 1 Dane's Dig., 241; *Clason v. Bailey*, 14 Johns. R., 484; *White v. Proctor*, 4 Taunt., 209; *Simonds v. Catlin*, 2 Caines' Rep., 61; Sugd. on Vend., 57-64.

In all sales at auction of either lands or goods, the person holding the auction describes the land, commodity, or thing offered for sale, the terms and time of payment, and the bidder consummates the contract by bidding the price he will pay, which, added to the terms and propositions of sale, and signed by the auctioneer, makes a contract in writing signed by the agent of both parties, and satisfies the statute. *Catlin v. Jackson*, 8 Johns. Rep., 520, 550 (1).

In *South Carolina*, in the case of *Jenkins v. Hogg*, 2 Const. Rep., 821, it was decided that a commissioner's sale of land, under an order of a Court of chancery, was within the statute of frauds, but that the commissioner was the agent of both parties, and his entry in the sale-book was a sufficient memorandum in writing to satisfy the statute, if it contained a sufficiency, and was signed by the commissioner. In *Kentucky*, a sale of lands by the trustees of a town at auction was decided to be within the statute of frauds, and that the trustees were the agents of both parties, but that their entry of sale in their sale-book did not satisfy the statute, not being signed by them. *Thomas v. Trustees, &c.*, 3 Marsh., 298. In *New Hampshire*, in the case of *Sherburne et al. v. Shaw*, 1 N. Hamp. Rep., 157,

it is decided that the sale of lands at auction are [\*477] within the statute, and that \*the memorandum, sale-book, &c., of the auctioneer, must contain a full, ample and complete description of the lands sold, names of the parties, price, terms of payment, &c., or it will not satisfy the statute.

It is, perhaps, useless to further multiply authorities; it is undoubtedly clearly settled, both by reason and judicial decision, that sales of land at auction are within the statute of frauds: and it may, without fear of controversy, be said, that the better reason, and a large majority of adjudicated cases, fairly establish that sheriffs' sales under writs of execution are also within the statute; that the sheriff is the agent of both parties; and that his return to his writ of the levy, sale, &c., if sufficiently full and complete, and signed by him, will satisfy the statute.

In the State of *New York*, in the case of *Simonds v. Catlin*, 2 Caines' Rep., 61, Judge *Kent*, who delivered the opinion of the Court, says, that there is nothing in either the form, substance, or nature of sheriffs' sales, to protect them from the introduction of fraud and perjury, any more than there is in other sales at auction; and that there is no reason why they should not be within the statute, as well as other sales at auction. He then adds that they are within the statute,

but that the sheriff's return in writing on his execution, of the levy, sale, &c., is sufficient to satisfy the statute, provided such return is signed by the sheriff, and contains with certainty the parties' names, the amount bid, the terms and time of payment, and a sufficient description of the lands as to metes, bounds, where situate and lying, number or supposed number of acres, &c. In the case of *Jackson v. Catlin*, 2 Johns. R., 248, this opinion of judge *Kent's* is reviewed and fully sanctioned; and, again, in the case of *Catlin v. Jackson*, 8 Johns. Rep., 520, it is again reviewed and affirmed.

In the city of *Baltimore*, in 1824, in the Court of Appeals of *Maryland*, it was unanimously decided by a full court, in an opinion delivered by the chief justice of the State, after the most profound and elaborate arguments by Messrs. *Wirt* and *Harper* on one side, and Messrs. *Taney* and *Magruder* on the other, that a sheriff's sale of land was within the statute of frauds, but that a proper return of the sheriff in writing to his writ, would satisfy the statute. *Barney v. Patterson's Lessee*, 6 Har. & J., 182, 205. It was also decided in the same court, in the case of *Boring v. Lemmon*, 5 Har. & J.,

223, that in sales of land by a sheriff on execution, [\*478] the sale, sheriff's return, and the payment \*of the purchasē-money, pass the legal estate and vest it in the purchaser; and that deeds are taken out of abundant caution to multiply the evidence of the vendee's title, and not, as is generally supposed, to vest the legal estate in the purchaser.

In conclusion, it is only necessary to add, that after the most patient and careful examination of the statute and the various decisions under it, no reasonable doubt is left respecting the point in controversy. Statutes of frauds and perjuries are enacted for the peace and repose of society, to protect men from hasty and inconsiderate engagements, and against any misconstruction of their words by witnesses who might misunderstand, or who might be in the employment and under the influence of the party wishing to avail himself of such an engagement. Upwards of one hundred and fifty

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years have elapsed since the first statute was passed in *England*, and every year from that time down to the present day, has added new and convincing proof of the salutary effects and beneficial influence of such laws upon the transactions of men, and no attempt should ever be made to circumscribe their due and legal operation by strict and illiberal judicial constructions. Sheriffs' sales have nothing in their nature, form, or manner of proceeding, to protect them from errors, misunderstandings, frauds, or perjury, more than other public sales have; therefore they are within the mischiefs intended to be prevented by the statute, and consequently must be within the statute.

The Court should have given the instruction asked

M'KINNEY, J.—I concur in opinion that this judgment be reversed. There is, however, a question presented by instructions asked by the defendant, and refused to be given by the Circuit Court to the jury, which denies the right of the plaintiff as sheriff, to maintain the action, and which, from its bearing upon this case and its general importance, in my humble opinion claims examination. To its examination, and to the presentment of my views, I am the more strongly impelled from a consciousness that a reversal of the judgment, for the reasons expressed in the opinion delivered, leaves the question as to the right to maintain the action admitted; a right which, from investigation, I am satisfied the law does not give.

The instructions to which I refer are the following: 1.

That no action can be sustained to charge the [\*479] defendant on any \*contract or sale of land, unless the agreement, or some memorandum thereof, be in writing and signed by the party to be charged, or by some lawfully authorized agent; 2. That there is no law authorizing the sheriff to bring this action.

The sale of the fee-simple of land by the sheriff was unknown to the common law. The sequestration of the profits of the land by a writ of *levari facias*, or the possession of a moiety



of the lands by the writ of *elegit*, and in certain cases of the whole of it by *extent*, were the modes of reaching it in *England*. The statute of 5 *Geo.* 2, c. 7, passed in 1732, changed the common law, only however in its application to the *American* colonies. That statute made lands, hereditaments, and real estate, chargeable with debts, and subject to the like process of execution as personal estate. That law, it is believed, has been adopted in most of the States of the *Union* since the revolution. With us it is modified, for, by our statute, lands are bound by judgments and subject to execution; the fee-simple, however, is not to be sold, if the rents and profits for seven years will sell for a sufficient sum to discharge the execution; and land is exempted from sale, if there be personal property of sufficient value to discharge the debt. I have adverted to the common law to show, that, by its authority, the sheriff could not sell land, and consequently could not maintain an action to recover the purchase-money. The right to sell, then, is given by our statute, and as the statute does not give him any additional authority except to sell, we must inquire whether the right to maintain an action is incidental to the authority to sell; for if it be not, he can not maintain the action. In this inquiry, we will be aided by recurring to the general character of that officer, and to the nature of his duties, with an execution in his hands.

The sheriff is the officer of the law, and is the medium through which the law executes its judgments. His duties are not discretionary, nor are they arbitrary; they are clearly defined, and must be in accordance with the requirements of law. He stands unconnected with either the plaintiff or defendant in an execution, and can not be regarded as the agent of either, for the admission of an agency, constituted by one party, would present the officer of the law with so much of its authority as is confided to him, in opposition to the rights of the other; and in such a struggle, so subversive of the principles of the law, the interests of the latter would be sacrificed. An agency, so far from being admitted, would be fraudulent, and vitiate an official act

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founded upon it. A sheriff is responsible to each party in the execution of a writ. If he fails to return it on its return day, makes a false return, neglects to pay over the money collected, and for various other acts, he is responsible to the plaintiff. To the defendant in an execution he is also liable, if he levies on and sells one description of property more privileged than another, as land, with us, where there is sufficient personal property, and for other acts, unnecessary to enumerate, beyond the sphere of his duty, operating to the injury of the defendant.

There is an obvious distinction between sales of land and of personal property, and of the lien by which they are respectively held. A judgment binds lands from its rendition: an execution, personal property only from its delivery to the officer. A sheriff selling land can not deliver possession of it, that, if withheld, must be obtained through an action of ejectment. With personal property it is otherwise; possession accompanies the purchase. By the writ of *venditioni exponas* in this case, the sheriff is commanded to sell the land, &c., returned on the *feri facias* as levied on, and with him rested the responsibility of the sale. He is under no obligation, if a person notoriously insolvent bids, to declare him the purchaser; nor is he bound, if one who is solvent bids, but who he believes would not perfect the sale by the payment of the purchase-money, to accept the bid. He should re-expose the property to sale; for the conduct of the sale is emphatically at his peril.

The return days of all executions being fixed by law, a *venditioni exponas* may be put into the hands of a sheriff, only allowing him time to advertise and sell. If in such a case he should advertise and sell, and the purchaser refuse to pay the purchase-money, what is the sheriff's situation? We are not without light in determining it. In *Zantzinger v. Pole*, 1 Dall. Rep., 419, the chief justice said: "By the spirit and words of the act, the sheriff must sell not merely to the highest, but to the best bidder: if the highest bidder was unable to pay, the sheriff might make an offer to the next highest; and that if the property was not paid for after a sale, the return should be that 'The premises were knocked down to A B for so much,

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that the said *A B* has not paid the purchase-money, and that, therefore, the premises remain unsold.'” In *Scott v. [481] Bruce*, 2 Harr. \* & Gill, 262, the case of *Zantlinger v. Pole* was cited, and its authority admitted. The case in *Maryland* was as to the sufficiency of a special return by a sheriff as follows: “Laid per schedule, and property sold to *A B* for \$—; resold to *C D* for \$—, and sale not complied with, and of course on hand.” This property was land. By the Court: The officer may return in this special manner, instead of returning in general terms, that the property was unsold for the want of buyers. We thus find by these cases, that the situation of the sheriff in the case I supposed, would not be one of danger or of liability. By re-exposing the property, and not selling for the want of buyers, he could return such fact, and his duty would have been performed. In neither of these cases, nor in any I have seen, nor in any elementary work, do we find a *dictum* that would warrant the sheriff suing in his own name, to enforce a compliance with a sale of land. Forms, it has a thousand times been said, and correctly too, afford evidence of the law; but in none I have examined, have I found authority for this action.

If a sheriff accepts a bid, it being the highest, and reposing confidence in the purchaser, returns the land sold, and thereby, in the event of the non-payment of the purchase-money, becomes himself liable for the sum at which it was sold, I apprehend, although in default, he is not without remedy. The sale and the application of the purchase-money, upon the hypothesis of its being paid by the sheriff, may bring him within the principle decided in the case of *Muir v. Craig*, at a former term of this Court. In that case, the land of *Craig*, a judgment-debtor, was sold by execution, and the proceeds of the sale applied to the satisfaction of the execution against him. *Craig* being without title to the land thus sold, and no benefit by the purchase and payment of his money accruing to the purchaser, *Craig* was held to be equitably bound to refund to the purchaser the money paid upon such sale.

It is contended that as the legislature, by an act in 1826,

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gave a summary remedy in favour of the sheriff against a purchaser of land failing to pay the purchase-money on a sale by the sheriff, that remedy was merely cumulative, and that the sheriff's right to an action at common law was thus recognized. Such a conclusion seems to be without foundation, as it must be obvious from the nature of the feudal system, opposed to the alienation of land, and which is even now felt, [\*482] though much ameliorated, in its operation upon the tenures of land in *England*, and from the restrictions of the common law to which I have adverted, that such an action must have been unknown. It could not have been contemplated: every principle of the common law opposed it. It is therefore manifest that that remedy was not cumulative, but original.

From the apparent unwillingness of the legislature to interfere with the right of the sheriff to re-expose the land for sale, I am fortified in my view of the common law; for it is expressly enacted, "That nothing in this section (that referred to in this argument), shall be so construed as to prevent a sheriff, or other officer, who may have exposed such property to sale, from re-exposing the same to sale on the same or some other subsequent day agreeably to the laws now in force." See Acts, 1826, p. 50. The act gave the sheriff a remedy by motion, to recover from a purchaser the difference between the sum bid for the land and that which it brought on a subsequent sale; the first sale not being complied with. That act was not embraced in the revision of 1831, and therefore not in force at the time this suit was brought. It was, however, re-enacted at the session of 1833. See Acts of that year, p. 65. One case only, that of *Cowgill v. Wooden*, November term, 1830, was brought before this Court, requiring a construction of the former act. In the opinion then given, no reference whatever is made to a common law remedy afforded the sheriff, but the proceeding is placed on its proper basis—the statutory provision.

As no principle of the common law authorises the institution of such a suit by the sheriff, we will see whether it is sanctioned by any analogy in the sale of personal property by that officer.



We have said, that on a sale of personal property, the possession provided the money be paid, accompanies the sale. The sheriff is not bound to deliver possession until the money is paid, and if payment is refused, it is his duty to re-expose the property to sale. *Downing v. Brown et al.*, Hard. R., 181. It is admitted that a sheriff having levied upon personal property, can maintain various actions, it being in his possession, against any person who shall divest him of possession; but the right to such actions, trover, trespass, &c., is founded on principles distinct from those that govern the present case.

If, however, the sheriff was entitled to this action at common law, a position which it is thought can not be maintained, it [\*483] becomes important to inquire how far the statute of frauds conflicts with the common law right. I shall, in the inquiry, confine myself to what I regard as settled constructions of the statute, without endeavoring to reconcile positions between which there may not in reality be a difference. It may be assumed as settled, that a sheriff's sale of land is within the statute, and requires a deed or note in writing of the sale, &c., signed by the sheriff. *Simonds v. Catlin*, 2 Caines' Rep., 61; *Jackson v. Catlin*, 2 Johns. Rep., 248; *Barney v. Patterson*, 6 Harr. & J., 182; 4 Kent's Comm., 2d ed., 434; 8 Johns. Rep. 520. With this principle settled, before we advance further let us see, even admitting the sheriff's return in this case to be full and complete, what is its legal effect as evidence. No principle is better established, nor is there one based more firmly in reason and justice, than that rule of evidence, that no one can be a witness in his own cause. *Testis nemo in sua causa esse potest*. If this rule be settled, as I contend it is, is it not violated by the sheriff's bringing this action and maintaining it by his return on the execution? It surely is. It is true, as remarked, that the sheriff is a public officer, and that credit is given to the statement upon his return, as to his official acts. See 1 Stark. on Ev., 283; *Gyfford v. Woodgate*, 11 East, 297. But it is not evidence for himself; it is only evidence against third persons: 3 Stark. on Ev., 1357; 1 id, 283; for a sheriff's return is no proof that he has paid

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over the money levied to the execution-creditor. 1 Stark. on Ev., 283; *Cator v. Stokes*, 1 M. & S., 599. These authorities all harmonize and support the main position.

Can it be contended that the sheriff could give parol evidence of the sale? I should think not.

The construction of the statute of frauds I have noticed places a sale of land by a sheriff, in some respects, on a footing with sales of land by an auctioneer. The note in writing by an auctioneer, which is held to conclude a purchaser, derives its effect from the view which is taken of the auctioneer. He is regarded as the agent both of the vendor and vendee. *M'Comb v. Wright*, 4 Johns. Ch. Rep., 659; *Clason v. Bailey*, 14 Johns. Rep., 484; Roscoe on Ev., 205, and authorities cited. It is demonstrable, that the agency of an auctioneer can not apply to the sheriff, for the auctioneer is the creature of the parties, and the sheriff the officer of the law; but [\*484] even admitting the application, it would not warrant the institution of this suit by the sheriff, for the agency of the auctioneer only binds the purchaser at the instance of the vendor (1). Chancellor *Kent*, in reviewing the opinion of Lord *Hardwicke*, in *The Attorney General v. Day*, 1 Ves., sen., 218, "that a judicial sale of an estate took it entirely out of the statute," says he does not comprehend the reason of it, and thinks it can not be because the sale is at auction, as those sales, if they relate to land, are within the statute; nor does he think that sheriff's sales are free from all danger of introducing fraud or perjury. With this opinion of Chancellor *Kent* it would seem that all would concur. But there is a difference between the judicial sales spoken of by Lord *Hardwicke* and a sale of land with us by a sheriff. Admitting him to be correct, his doctrine does not apply, for the judicial sales are made by order of the court of chancery through a commissioner or auctioneer.

Again, it is laid down that "a mere agent or attorney having no beneficial interest in a contract, can not maintain an action in his own name." See *Gunn v. Cantine*, 10 Johns. R., 387; 1 Chitt. Pl., 5. And although in *Williams v. Millington*, 1 H.

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Bl., 81, it was held that an auctioneer employed to sell goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property; yet upon examination it will be seen that this decision is not in opposition to the principles for which I contend. The auctioneer has not only a possession coupled with an interest in the goods he is employed to sell, but also a special property with a lien for charges of sale, duty to the crown, &c., in *England*.

I conclude my remarks with the settled conviction, that as this suit is without a legal foundation, no amendment of the declaration, or adduction upon trial of more full proof, can avail the plaintiff. I may be mistaken in my opinion, but if I am, I am gratified by the reflection that the mistake does not arise from the absence of careful and assiduous investigation.

*Per Curiam*.—The judgment is reversed and the verdict set aside, with costs. Cause remanded, &c.

*S. Judah*, for the appellant.

*C. Dewey* and *J. Law*, for the appellee.

[\*485] \*(1) If the auctioneer himself bring the suit, his memorandum of the sale is not sufficient to take the case out of the statute, according to the cases of *Wright v. Dannah*, 2 Campb., 203, and *Farebrother v. Simmons*, 5 Barn. & Ald., 333. The language of the Chief Justice, in the case last cited, is:

"In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the auctioneer suing as one of the contracting parties. The case of *Wright v. Dannah*, seems to me to be in point, and fortifies the conclusion at which I have arrived, viz: that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record."

The Court of K. B. very recently (in 1833) referred to those cases, but gave no opinion as to their correctness. The case in which they were mentioned was this: An auctioneer sued for the price of the goods sold by him, and the memorandum of the sale, which he relied on, was made at the sale by his clerk. Verdict for the plaintiff, and a rule for leave to move for a nonsuit. Per *Denman*, C. J. "I think this case is distinguishable from *Wright v. Dannah*, 2 Campb., 203, and *Farebrother v. Simmons*, 5 Barn. & Ald., 333, and it appears to me that the clerk was not acting merely as an automaton, but as

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M'Neal v. Woods, in Error.

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a person known to all engaged in the sale, and employed by any who told him to put down his name. Without, therefore, interfering with the cases that have been cited, I think the rule must be discharged." The other judges expressed similar opinions. *Bird v. Boulter*, 4 Barn. & Adolp., 443.

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## M'NEAL v. WOODS, in Error.

SLANDER. The declaration stated that on, &c., at *Brookville*, &c., a dwelling house, the property of *Enoch M'Carty*, was consumed by fire, and that the defendant, in a discourse concerning the said fire, spoke these words: "I (the defendant meaning) believe that *Charles M'Neal* (the plaintiff meaning) had the house (meaning the said dwelling house) set on fire intentionally, and the circumstances attending the case are sufficient to prove it," thereby alluding to the said fire, and meaning that the plaintiff had occasioned it, and had thus been guilty of arson. Plea, not guilty.

The evidence was, that on, &c., at *Brookville*, &c., several houses were destroyed by fire; that two of them belonged to the said *M'Carty*; that *M'Carty* was not in possession of either of the houses, one of them being in the plaintiff's possession as a tenant for the year, and the other in [\*486] the possession of another \*tenant for the year, and that the words charged were spoken of the plaintiff and the said fire.

The Circuit Court, on the defendant's motion, instructed the jury as follows:

1. That arson is an offense against the possession, and if they believed from the evidence that the plaintiff was in the possession of the house as tenant for the year, he could not be guilty of arson in burning it, while it was in the plaintiff's possession as such tenant, and that if the defendant charged the plaintiff with having set that house on fire, it could not amount to a charge of arson (1).



Laughran, Treasurer, on the relation of Spiller, v. Campbell and Others.

2. That if the words charged in the declaration were spoken concerning another house, the property of *M' Carty* in fee, which was, by the aforesaid fire, consumed, and which was in the possession of a tenant for the year at the time of the burning, and so understood by the hearers, it would not support the charge in the declaration as to the burning the house of *M' Carty*, but that it should have been stated as the house of the tenant.

Verdict and judgment for the defendant.

*The Court* held that the first instruction could not be objected to, but that the second was erroneous. The judgment was accordingly reversed with costs, the cause remanded, &c.

*D. J. Caswell*, for the plaintiff.

*O. H. Smith*, for the defendant.

(1) "Declaration stated that defendant, intending to cause it to be believed that plaintiff *had been guilty of willfully setting his house and premises on fire*, said of the plaintiff that he had set fire to his own premises, meaning that he had *been guilty of willfully setting fire to the premises*, which, while in his occupation, had been destroyed by fire: After verdict for the plaintiff, the judgment was arrested, on the ground that willfully setting his own premises on fire was not, except under special circumstances, a crime punishable by law, and the Court would presume only such circumstances as it was essentially necessary for the plaintiff to have proved in support of his declaration." *Sweetapple v. Jesse*, 5 Barn. & Adolp., 27.

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LAUGHRAN, Treasurer, on the relation of SPILLER, v. CAMPBELL and Others, in Error.

DEBT on a constable's bond against the principal and his sureties. The declaration assigns the following breaches:

[\*487] \*1. That on the 30th of *August*, 1826, *Spiller* caused a *fieri facias* to be issued by *R. Meek*, a justice of the peace, and successor in office of *J. Goodhue*, late a justice of the peace, which execution was issued by *Meek* (who had

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by succession and delivery *Goodhue's* docket, and sufficient authority for the purpose) on a judgment rendered by *Goodhue* on the 27th of *November*, 1822, in favour of *Spiller* against *French* for, &c.; that the execution was directed to *Campbell*, as constable, and placed in his hands to be served; that *Campbell* did not execute the writ, though *French* had sufficient goods, &c., but refused to levy, &c.; whereby, &c. 2. That *Campbell*, by virtue of such another execution so issued, levied on a horse of *French's*, &c., but refused to sell him, and permitted *French* to take him away, &c. 3. That *Campbell*, by virtue of such another execution so issued, levied on a horse, &c., and falsely returned that the horse was rescued, &c., and that there was no other property, &c. 4. That *Campbell* having received such another execution so issued, neglected and refused to make any return of the same, &c. 5. That *Campbell*, by virtue of such another execution so issued on a judgment, &c., which had been transferred from the docket of justice *Goodhue* to that of justice *Meek*, levied on a horse, &c., and falsely returned that the horse was rescued, &c.

The defendants demurred to the whole declaration, except the 5th breach. Causes of demurrer: 1. It is not shown that the judgment had been revived by *scire facias*. 2. It is not shown that *Goodhue's* judgment had been legally transferred to *Meek's* docket. 3. It is not averred that the relator had recovered a judgment against the constable. Plea to the 5th breach, that the judgment was not duly transferred, &c., concluding to the country.

The plaintiff demurred to the plea, because it concluded to the country.

The defendants' demurrer was sustained, and that of the plaintiff overruled. Judgment below for the defendants.

The Court considered, that the demurrer of the defendants should have been overruled, and that of the plaintiff sustained. Judgment reversed with costs. Cause remanded, &c.

*J. H. Scott* and *P. Sweetser*, for the plaintiff.

*J. H. Thompson* and *H. P. Thornton*, for the defendants.

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\*M'GLEMERY v. KELLER.

**MALICIOUS PROSECUTION—PERJURY.**—In malicious prosecution, one of the counts stated that the defendant falsely, &c., charged the plaintiff with perjury, and, on such charge, falsely and maliciously procured him to be arrested and imprisoned for, &c., and at the expiration, &c., the plaintiff was duly acquitted. *Held*, that this was a count in malicious prosecution and not in trespass.

**SLANDER—PERJURY.**—In an action of slander for charging the plaintiff with committing perjury on a certain trial,—a plea that the charge is true, is not supported by proof that the plaintiff had sworn false on the trial, as to an immaterial point. (a)

**EVIDENCE—DAMAGES.**—Actionable words laid in a declaration in slander, spoken after the commencement of the suit, can not be proved in aggravation of damages.

ERROR to the *Parke* Circuit Court.

**BLACKFORD, J.**—This is an action on the case brought by *Keller* against *M'Glemery*. There are several counts in the declaration; some of them for malicious prosecution and some for slander. The plaintiff, in the counts for malicious prosecution, complains that the defendant, maliciously and without probable cause, caused him to be arrested by legal process on a charge of perjury. In the counts for slander, the words alleged to have been spoken are, that the plaintiff had, in a certain suit in this State, committed perjury; and that he was forsworn in *Tennessee* (1). The defendant pleaded the general issue to the whole declaration, and he also pleaded in justification to the counts in slander, that the words were true. To the general issue, the plaintiff added the *similiter*; and to the plea in justification, he replied *de injuria sua propria*. The cause was tried, and a verdict and judgment were rendered in favour of the plaintiff for \$275.

The first objection made by the plaintiff in error, who was the defendant below, is, that one of the counts is in trespass, whilst all the others are in case. The count said to be in trespass states, that the defendant further contriving, &c., falsely

(a) *Lanter v. M'Ewen*, 8 Blackf., 495, and cases there cited.

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M'Glemery v. Keller.

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and maliciously and without any reasonable or probable cause, charged the plaintiff with having committed perjury, and upon such last-mentioned charge, the defendant, on, &c., at, &c., falsely and maliciously procured the plaintiff to be arrested and imprisoned for, &c., and at the expiration, &c., the plaintiff was duly acquitted. This count is copied from a form in 2

Chitt. Pl., 610. The count may be objectionable on [\*489] demurrer, on \*account of the generality of its terms; but it can not be considered a count in trespass. There is not, therefore, any misjoinder.

It is also objected that the Court refused to instruct the jury that if the plaintiff swore false on the trial in question, though on an immaterial point, he could not recover. There is no error in this refusal. The defendant had charged the plaintiff with perjury, and had pleaded in justification that the charge was true. To support his plea, he was bound to show that the plaintiff had sworn false on the trial, to a matter material to the issue. If the matter sworn to was immaterial, there was no perjury, and the defendant's charge was without foundation. *Crookshank v. Gray*, 20 Johns. R. 344.

Another objection made to the proceedings is, that actionable words laid in the declaration, spoken long after the commencement of the suit, were admitted in evidence, although they were objected to by the defendant; the Court saying, *in the hearing of the jury*, that the evidence was admissible in aggravation of damages. This evidence was certainly inadmissible for the purpose of aggravating the damages. The plaintiff could not, in this action, recover damages for words spoken after the commencement of the suit. Actionable words so spoken, have been sometimes admitted to show, that the words for which the suit was brought had been *maliciously* spoken, but they have never been received to increase the damages. 1 Campb. R., 49. *Macleod v. Wakley*, 3 Carr. & Payne, 311. 2 Stark. on Ev., 869. *Thomas v. Crosswell*, 7 Johns. R., 264. The record in the present case shows, that the Court said in the hearing of the jury, that the evidence objected to was admissible *in aggravation of damages*. The jury may have been



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O'Brien and Others, Executors, v. Holland, Administrator, in Error.

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misled, in their estimate of the damages, by the expression of this erroneous opinion of the Court; and the judgment for the plaintiff below must, therefore, be reversed.

*Per Curiam*.—The judgment is reversed, and the verdict set aside, with cost. Cause remanded, &c.

*I. Naylor*, for the plaintiff.

*A. S. White* and *D. Wallace*, for the defendant.

(1) "The accusation of felony before the magistrate, or in any other course of legal proceeding, can not be treated as *libellous*, 1 Saund., 132, n. 1; but if the defendant, at any other time, accuse the plaintiff of the felony, counts may be added for the words, 1 Saund. 133." 2 Chitt. Pl., 6th Amer. ed., 611, note.

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[\*490] \*WATSON and Another v. MATTOX, on Appeal.

ASSUMPSIT by *Mattox* against *John H. Watson* and *Henry Allen*, for a quantity of plank sold and delivered. Plea, the general issue. There was some evidence of *Watson's* acknowledgment of his having received the plank; but there was no proof of any liability on the part of *Allen*.

*Held*, that this being an action on a contract against two persons, and there being no evidence except as to one of them, the plaintiff could not recover. 1 Chitt. Pl., 50.

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O'BRIEN and Others, Executors, v. HOLLAND, Administrator, in Error.

A BILL in chancery was filed against the executors of a testator for money alleged to have been received by the deceased for the use of the complainant's ancestor. It appeared, by the

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evidence, that more than thirty years had elapsed since the receipt of the money. *Held*, that, so long a time having elapsed, payment of the demand should be presumed. 1 Madd., 99; Jer. Eq., 549; *Smith v. Clay*, Amb., 645; *Hoven-den v. Ld. Annesley*, 2 Sch. & Lef., 607, 630; *Ellison v. Moffatt*, 1 Johns. C. Rep., 46.

## DORMAN v. ELDER.

CONTRACT—DELIVERY—PLEADING.—To an action of covenant for the non-delivery of hogs worth a certain sum, by a specified time, &c., the defendant pleaded in bar, that the hogs were set apart on, &c., and that the plaintiff failed to attend, &c. *Held*, that the plea should have stated the number of hogs so set apart, and, also, that they were left at the place for the plaintiff, or that they had always been, and still were, ready to be delivered, &c. (a).

SAME.—The defendant also pleaded in bar, that before the covenant was to be performed, the parties agreed that the defendant should, instead of the hogs, and at a time subsequent to that fixed for their delivery, [\*491] deliver cattle, &c.; that he \*had the cattle ready and set them apart, &c., and had always kept them ready, &c.; but that the plaintiff had never attended, &c. *Held*, that this plea was defective, for not averring that the defendant would have complied with the first contract, if the plaintiff had not prevented him as mentioned in the plea.

## ERROR to the Scott Circuit Court.

STEVENS, J.—*Elder*, the defendant in error, declared against *Dorman*, the plaintiff in error, in the Scott Circuit Court, on a covenant under seal, in these words and figures, to wit: "By the first day of November next, I will pay Samuel Elder \$90.43, in merchantable hogs, for value received of him, as witness my hand and seal. December 8th, 1828. Henry Dorman [L.S.]" *Dorman* pleaded in bar three several special pleas, all of which were demurred to, the demurrers sustained, and final judgment rendered in favour of *Elder*, the plaintiff below, that he recover of *Dorman* \$101 damages, together with his costs, &c.

(a) *Frazer v. McChord*, 1 Ind., 224.

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The question before this Court is, Whether these pleas, or any one of them, contain a legal bar to the plaintiff's action? The second plea is clearly defective; the demurrer to it was therefore correctly sustained, and no further notice need be taken of it. The third plea is, that he, the said *Dorman*, on the said first day of *November*, 1829, the day on which said hogs were to be delivered, was ready and willing throughout the whole course of the said day, until the uttermost convenient hour thereof, at his, said *Dorman's* residence, in the said county, to have discharged his said covenant in hogs, agreeably to the tenor and effect of his said covenant, and did then and there set apart "a number of hogs," of the description named in the covenant, sufficient to have discharged the same, but that said *Elder* failed to attend and receive them.

It is contended by *Dorman*, that this plea contains a sufficiency, if true, to bar the plaintiff's action; and he relies solely on the opinion of this Court in the case of *Johnson v. Baird*. In that case, among other things it is said, that "the plea of readiness to perform is dictated and sustained by common sense, the common and daily transactions of men, and by the principles of natural justice; and is allowed for the mutual benefit of both parties, and not solely for the benefit of the defendant." And, again, it is further said in the same opinion, that "in all cases where the debtor wishes to discharge himself,

not only from the contract, but also from all future [\*492] liability for the \*articles set apart, he must set them off by count, measure, weight, or value, agreeably to his contract," so that the creditor can distinguish and know them; and when so set apart, they must be there left and abandoned for the creditor, to enable him to take possession of them when he pleases, or maintain an action of trover and conversion for them against any person who may interfere with them.

If, then, the plea under consideration is intended to operate as a bar, not only of the contract, but also a bar to any future liability for the articles set off to the creditor, it is clearly insufficient. It lacks two most material averments. The number

of the hogs set off to the creditor is not shown. This is material, to enable the creditor to inquire after them, take possession of them, or bring suit for them, if found in the possession of others. Again, it is not stated that the hogs set off to the creditor were there abandoned by the debtor, and left as the property of the creditor. It may be, for aught that appears upon the face of the plea, that the debtor kept the hogs himself, and never left them at the place where he avers he set them off, a single moment, but instantly converted them to his own use.

If, however, it should be said that this plea is not intended as a bar to all future liability for the hogs set off to the creditor, but only a bar to the covenant, it will be found equally defective. In the case of *Johnson v. Baird*, above noticed, this Court says that where the debtor does not abandon the articles set off to the creditor, but elects to keep possession of them himself, he undertakes at his own peril and risk to keep them safely for the creditor, and to deliver them to him whenever he demands them at the proper place; and that it must be averred in the plea that the debtor was ready at the time, place, &c., with the articles, and that the creditor was not there to receive them, as is averred in this plea, and also that he has ever since been so ready, and is still so ready, to deliver said articles whenever the creditor should attend to receive them. These latter averments are not in this plea, and therefore it is in that particular, also, materially defective, and the demurrer to it was well taken.

The first plea is of a different character; it presents not only an important, but a vexed question. It avers that between the day of making the covenant under seal and the day appointed for the delivering of the hogs, it was agreed by and between him, the said *Dorman*, and the said *Elder*, [\*493] that he, the said *Elder*, \*would receive cattle in lieu of the said hogs, in discharge of the covenant, if said cattle were delivered at any time in the course of the summer of 1830, and that he, *Dorman*, was ready and willing, at his residence in the said county of *Scott*, throughout the whole course of the summer of 1830, to have delivered said cattle,



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and did then and there designate and set apart the same for the said *Elder*, but that he never attended to receive them, and that he, the said *Dorman*, has ever since had said cattle at his said residence, and still there has them ready to deliver to the said *Elder*, but that he has never as yet attended to receive them.

The first objection raised to this plea is, that it is not shown by the plea where the cattle, which were to be received in lieu of the hogs, should be delivered, and that, consequently, it is not shown that they were tendered and kept ready for delivery at the place stipulated for the delivery. It is true that no place is named in the plea as the stipulated place of delivery, but it does not follow as a consequence that it is not shown that the cattle were tendered and kept ready to deliver at the proper place. No place of delivery is named in the sealed covenant, on which the suit is brought, for the delivery of the hogs, nor is any place of delivery averred in the declaration, except the county of *Scott*, and as the cattle named in the plea were substituted for the hogs, without any designation of a place of delivery, it is necessarily implied that they were to be delivered at the same place that the hogs were to have been delivered. The question then is, where were the hogs to have been delivered? The declaration avers that the sealed covenant was made in the county of *Scott*, and that the hogs were to have been delivered in the county of *Scott*, and this plea in reference to the declaration, and in reference to the whole record preceding it, avers that the residence of *Dorman*, the obligor in the sealed covenant, was in "said county," that is, the said county of *Scott*, the place where the sealed covenant was made, and the place where the declaration avers that the hogs were to be delivered. Under that state of facts, the hogs would have been properly delivered at the residence of the obligor, and therefore the plea, as to that, is sufficient.

The next and principal objection to this plea is, that it is an attempt to dissolve or rescind a covenant under seal by a parol contract. This objection is one of much weight, and [494] should not be lightly passed over. If such is the

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character of the plea, it can not be sustained, for there is no principle of the common law better settled than that an agreement, under seal, can only be dissolved by an agreement of the same character; that is, by an agreement under seal.

Where an action is brought by one of the parties to an agreement under seal to recover pay or damages from the other party for having performed the covenants contained in the agreement, on his part to be performed, it is impossible for him to recover, unless he has performed those covenants. He must recover on the face of the agreement on which his suit is brought. No parol agreement can be substituted which can enable him to recover on the covenants in the sealed agreement, unless he has well and truly performed his part of those covenants. By his sealed agreement he has covenanted to do certain things, and if he brings suit upon that agreement, he must aver that he has done those things in manner and form as by the sealed agreement they are stipulated to be performed, and he must also prove that he has done them as laid, or he must fail in his suit. He can not be permitted to prove that he has done other things, which, by some other agreement, were substituted for those stipulated to be done by the sealed agreement on which he has brought his suit; if he were permitted so to do, the defendant would have no notice of what he was called on to answer. *Brown v. Goodman*, 3 T. R., 592, note; *Heard v. Wadham*, 1 East, 619; *Thompson v. Brown*, 7 Taunt., 656; *Ratcliff v. Pemberton*, 1 Esp. Rep., 35; *Philips et al. v. Rose*, 8 Johns. Rep., 392; *Handley v. Moorman*, 4 Bibb, 1 (1).

But in the case now under consideration, the obligee has brought suit against the obligor to recover damages of him for not having performed his covenant in manner and form as, by the sealed agreement on which the suit is brought, he bound himself to do, and the subsequent parol agreement set up as a defense in the plea under consideration, is in bar of the recovery of damages, and is not intended as a dissolution of the written agreement. The defense is not that the sealed agreement, on which the suit is brought, has been dissolved or rescinded, but

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that the plaintiff has accepted other articles in lieu of his damages, and that, therefore, he is not entitled to recover.

In the case of *Keating v. Price*, 1 Johns. Cas., [\*495] 22, the Court \*said an extension of time may often be essential to the performance of executory contracts, and that there could be no reason why a subsequent parol agreement for that purpose should not be valid. In the case of *Fleming v. Gilbert*, 3 Johns. Rep., 528 (a case in principle precisely like this), the Court says, that the plaintiff in that case waived a compliance with the condition of the bond; and that no rule or principle of the law was infringed in permitting parol evidence of such waiver. The Court in that case further said, that it is a sound principle that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned; and that in the case then before the Court, it was plain that the defendant would have complied with the condition of his bond, had not the plaintiff dispensed with it. The Court further in that case says, that such rules in ancient as well as in modern decisions exist, and cites with approbation a case from the Year Books, where the condition of the bond was to raise a mill, and the obligor offered to perform, but the obligee refused to have it done, and that was held sufficient to excuse him from the performance.

In the case of *Heard v. Wadham*, 1 East, 619, *Lawrence*, justice, admits that subsequent to the breach of a covenant, the covenantee may substitute, agree to, and accept something else in lieu of what the covenantor was bound to do, in satisfaction of his damage, and that such a substitution is a sufficient answer to any suit brought for damages for the non-performance of the thing stipulated; and that such substitution may be proved by parol. And Chief Justice *Gibbs*, in the case of *Thompson v. Brown*, 7 Taunt., 656, says that he well understands that doctrine; and, he adds, that in such case the man is paid his damages by accepting something in lieu of that which he was entitled to. In the case of *Ratcliff v. Pemberton*, 1 Esp. Rep., 35, in an action of covenant on a charter-party of a ship, to recover demurrage for not having

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discharged the cargo on the day stipulated, the defense set up was, that the defendant could and would have discharged the cargo by the time limited, but that the plaintiff enlarged the time, &c. This, Lord *Kenyon* said, was a good and legal defense against the claim of the plaintiff, if it had been specially pleaded.

In the present case, if *Elder*, the covenantee, had actually received from *Dorman*, the covenantor, the cattle mentioned in the plea in lieu of the hogs, no doubt can exist but [\*496] that his \*right to recover damages for the non-delivery of the hogs would be barred. If, then, this case is not distinguishable from other cases of contracts to deliver specific articles, every legal consequence follows a tender, refusal, and readiness to perform, that would follow an absolute delivery, if the matter is properly pleaded. In this plea, *Dorman* avers that at the proper time and place he had the cattle ready, and then and there set them off for *Elder*, the covenantee; and that he has ever since kept them there ready, and still has them there ready, to deliver to *Elder* if he will attend to get them. So far, this plea is sufficient and perfect in all its averments, but still it lacks one important averment, and without which the plea cannot be sustained.

The defense set up in this plea is and must be bottomed on the fact, that *Dorman*, the covenantor, was willing to have discharged his covenant under seal, by delivering the hogs at the proper time and place agreeably to the tenor and effect thereof; and that he would have so performed, had he not been prevented by *Elder*, the covenantee, in manner and form as set out in the plea; and this averment must be directly and positively averred, and not left to be collected by inference.

It is a general rule in special pleading, that each special plea is taken most strongly against the party pleading it, and most favourably to his adversary; and to this rule there is no exception. Whenever the defendant acknowledges the plaintiff's cause of action, both as to facts stated and the conclusions of law arising thereon, but seeks to avoid it by new facts which he offers, he must state those facts with clearness and



certainty, and in direct and positive terms. The rule is, that the party pleading must be supposed to have made his statement as favourable for himself as the truth will possibly admit, and therefore it would be doing injustice to the opposite party, to infer that the truth of the case is more favourable than the party himself has stated it. The party setting up the defense knows the truth of the case he is stating, and can state it with clearness and certainty, and in direct and positive terms, if he desire to do so; and if he do not so do, he must bear all the inconvenience which may grow out of his failing so to do.

In this plea there is no averment that *Dorman*, the covenantor, was willing to perform and would have performed his covenant under seal, by delivering the hogs at the [\*497] proper time \*and place, agreeably to the tenor and effect of said covenant, had he not been prevented by the covenantee in manner and form as set out in the plea; and without such an averment the plea is radically defective.

M'KINNEY, J.—I concur in the opinion just delivered, affirming the judgment in this case. I, however, differ from a majority of the Court in the view taken of the first plea. In my opinion, it is radically bad, and as the question involved is important, I will present the reasons upon which my opinion has been formed.

The plea rests upon the validity of a parol agreement, entered into after the execution of the sealed instrument, the foundation of the suit, and before the day upon which the property mentioned in the covenant was to have been delivered. The plea would appear to be relied on as an accord and satisfaction, and if not good as such it is bad.

I will notice a few rules applied to sealed instruments and contracts in writing, before I test the sufficiency of the plea as a plea of accord and satisfaction. 1. A sealed instrument can not be dissolved, except by an instrument executed with equal solemnity. 2. Written agreements, whether specialties or simple contracts, and whether within or without the statute of

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frauds, can not be contradicted, varied, or materially affected by parol evidence. 3. Parol evidence of fraud, or the want or failure of consideration, or of the enlargement of the time for performance, or a waiver of the performance of a written simple contract, is admissible. 4. Such evidence of fraud, and of the want or failure of consideration, by our statute, and of the enlargement of the time of performance, and waiver of the performance, also applies to sealed instruments. *Erwin v. Saunders*, 1 Cow. R., 249; *Hunt v. Adams*, 7 Mass. R., 518; *Stackpole v. Arnold*, 11 Mass. R., 27; *Fitzhugh v. Runyon*, 8 Johns. R., 375; *Thompson v. Ketcham*, Id., 189; *Wells v. Baldwin*, 18 Johns. R., 45; *Hoare et al. v. Graham*, 3 Campb. R., 57; *Davey v. Prendergrass*, 5 Barn. & Ald., 187; 2 Chitt. R., 336; *Baylis v. Dineley*, 3 M. & S., 477; *Crane v. Newell*, 2 Pick. R., 612.

The first inquiry is, Does the parol agreement set up in the plea conflict with these, or with either of these rules? By the sealed instrument, the defendant covenanted to pay to the plaintiff ninety dollars and forty-three cents in merchantable hogs by the \*1st day of *November*, 1829. By the plea, the defendant is to pay that sum in cattle during the summer of 1830. These contracts are entirely different; the variance reaching not only to the subject-matter, but also to the time of performance, of substance in a contract. It can not be contended, that the sealed contract is dissolved, or that it is not contradicted by the parol agreement relied on. Is it then avoided by fraud or the want or failure of consideration, or is an action upon it suspended by an enlargement of the time of its performance, or finally, is there a waiver of the performance, or a discharge of the agreement? I think these questions must be answered in the negative. All that the plea presents is the substitution of one cause of action for another, and as the matter pleaded was executory and without consideration, it can not constitute a valid defense.

The next inquiry is, Was the plea good as a plea of accord and satisfaction? An accord and satisfaction is a bar to an action brought on a bond, but a mere parol and executory

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agreement, or a mere accord without satisfaction received, is no bar. 1 Bac. Ab., 43; Com. Dig. tit. Accord, B; *Russell v. Lytle*, 6 Wend., 390; *Lynn v. Bruce*, 2 H. Bl., 317; *Allen v. Harris*, 1 Ld. Raym., 122; 9 Rep., 79; *Balston v. Baxter*, Cro. Eliz., 304; *Rayne v. Orton*, Cro. Eliz., 305-6; 3 Bl. Comm., 15. The plea alleges, that before the time designated for the delivery of the hogs, the parol agreement for the delivery of the cattle was entered into. The case of *Handley v. Moorman*, 4 Eibb, 1, is in point and sustains my view of the plea. In that case it was held, that in covenant for the payment of tobacco by installments, at a particular place, a plea that the place of payment was changed by the agreement of the parties, prior to the respective installments becoming due, was bad. An accord and satisfaction pre-suppose a wrong done, or a liability incurred. Until a wrong be done, as in tort, &c., or a liability incurred by breach of a contract, either sealed or parol, there can not be an accord and satisfaction. It would seem to be as correct in an action of trespass, to treat a plea alleging accord and satisfaction before the trespass was committed, as good, as in an action on a specialty, to recognize such a plea as a bar before the liability was incurred.

After breach of a covenant, the acceptance of satisfaction, all know, is a discharge of the covenant. This, [\*499] however, has not \*occured. *Payne v. Barnet*, 2 Marsh. R., 312, is in accordance with *Handley v. Moorman*, and appears to me, with the law noticed, to decide this case. It was said in *Payne v. Barnet*, that after breach of a covenant, a parol agreement, if executed, may be relied on as a plea of accord and satisfaction, but to render such plea good, it should aver not only accord, but complete satisfaction, but that accord and satisfaction, until after a breach, could not be pleaded.

Without adverting to the right of the covenantee in this case, to sue upon the parol agreement, a point which it seems would much strengthen my view of the plea, and which I am far

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from admitting, I conclude this examination with a firm belief, founded on careful investigation, that the plea is radically bad.

*Per Curiam*.—The judgment is affirmed with costs.

*H. P. Thornton* and *A. C. Griffith*, for the plaintiff.

*J. H. Scott*, for the defendant.

(1) Vide *Sinard v Patterson*, ante, p. 353, and note.

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### MITCHELL and Others v. PORTER.

**JUDGMENT ON PENAL BOND.**—In debt on a penal bond conditioned for the performance of covenants, the final judgment for the plaintiff is for the debt, that is, the penalty of the bond, and for the costs; and execution is awarded for the damages assessed. The execution—following the judgment—is for the debt (penalty) and costs; but is endorsed to levy the amount of damages assessed, together with the costs of suit.

**APPEAL** from the *Harrison* Circuit Court.

**BLACKFORD, J.**—*Porter* brought an action of debt against *Mitchell* and others, on a bond in the penalty of \$150. The condition of the bond, as appears by the declaration, was for the delivery of certain property upon which an execution had been levied. The breach assigned is the non-delivery of the property according to the condition of the bond. There was a demurrer to the declaration, and judgment for the plaintiff below.

The jury impaneled to inquire of the breaches, found that the defendants were guilty of the breach assigned, and [\*500] that the \*plaintiff had thereby sustained damages besides his costs, to the amount of \$88.21. The judgment is as follows: "Therefore it is considered, that the plaintiff do recover against the defendants his said debt, and also \$88.21 for his damages, which he hath sustained, as well on occasion of detaining the said debt, as for his costs and charges by him about his suit in this behalf expended, by the court here adjudged to the plaintiff, and with his assent. And



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it is also considered by the Court here, that the plaintiff have execution against the defendants of the damages to \$88.21, by the said jury in form aforesaid assessed on occasion of the aforesaid breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided. And the defendant in mercy," &c.

There is no substantial objection to the declaration, nor to the form of the verdict, in this case. There is an error, however, in the entry of the final judgment. The mistake is in the rendition of a judgment not only for the debt, but also for the damages assessed by the jury. The form of the judgment in the *English* books is, that the plaintiff recover his said debt (which is the penalty of the bond), with *nominal* damages (usually one shilling), and the costs of suit. The damages assessed by the jury are not noticed in the judgment. That form would not be objectionable here. The judgment for *nominal* damages is, however, unnecessary. The judgment, in these cases, may be for the debt, that is, the penalty, and for the costs of suit. Execution may be awarded for the damages assessed. The execution, it is true, must follow the judgment, and be for the debt (penalty) and the costs; but it must be endorsed to levy the amount of the damages assessed by the jury on account of the breaches assigned, together with the costs of the suit. See *Clark v. Goodwin*, July term, 1820; *Glidewell v. M'Gaughey*, November term, 1830; *Morris v. Price*, November term, 1831.

*Per Curiam*.—The judgment is reversed, and the cause remanded, &c.

*H. P. Thornton*, for the appellants.

*J. H. Thompson*, for the appellee.

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Archer v. The Board of Commissioners of Allen County

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[501\*] \*ARCHER v. THE BOARD OF COMMISSIONERS OF  
ALLEN COUNTY.

COUNTY COMMISSIONERS—ACTION AGAINST—PLEADING.—In an action against a board of county commissioners, for work and labor, or goods sold and delivered, the declaration must show some act, creating their liability, to have been done by them at a regular meeting of the board at the time fixed by law. (a)

ERROR to the *Randolph* Circuit Court.

BLACKFORD, J.—Assumpsit by *Archer* against the board of commissioners of *Allen* county. There are four counts in the declaration. Two of the counts are founded on a special contract relative to the making of bricks by the plaintiff for the defendants. The other counts are for bricks sold and delivered to the defendants by the plaintiff. General demurrer to the declaration, and judgment for the defendants.

The declaration, in this case, cannot be sustained. The defendants are only charged in their corporate capacity. No act of theirs, relative to the subject-matter of this action, could render them liable in their character of commissioners, unless such act was done by them at a regular meeting of the board at the time fixed by law. The declaration does not show any act of the commissioners done at such a time; and it is consequently insufficient.

*Per Curiam*.—The judgment is affirmed with costs.

*H. Cooper*, for the plaintiff.

*D. H. Colerick* and *M. M. Ray*, for the defendants.

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(a) *The Board, &c., v. Chitwood et al.*, 8 Ind., 506; 8 Blackf., 471; 3 Ind., 327.

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Abel v. Burgett.

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## HOAGLAND v. ROGERS, in Error.

AN action of debt may be brought in this State, upon the judgment of a justice of the peace in another State; but a *scire facias* to procure the award of an execution on such a judgment does not lie.

[502\*]

## \*ABEL v. BURGETT.

PLEADING—PRACTICE.—The filing of additional pleas in the Circuit Court on appeal, if no objection was there made to them, cannot be assigned for error.

FRAUD—INSTRUCTIONS TO JURY.—Debt on a sealed note for \$100. Plea, that the note was given for a horse fraudulently represented as sound, but which was unsound and worth nothing. The only proof as to the consideration of the note, was, that it had been given, together with fifty dollars, for a horse. The Court instructed the jury, that if the fifty dollars had been paid, and the horse was worth no more, they might consider the whole consideration of the note to have failed. *Held*, that the instruction was erroneous.

APPEAL from the *Jackson* Circuit Court.

M'KINNEY, J.—Action of debt on a writing obligatory for \$100 before a justice of the peace. Judgment for the plaintiff.

On appeal to the Circuit Court, the defendant, without any objection appearing to be made, filed two special pleas: 1. That the consideration of the note was the sale and delivery by the plaintiff to the defendant of a horse, and that the plaintiff at the time of the sale, falsely and fraudulently represented to the defendant that the said horse was sound, &c. The defendant, by averment, negatives the representation of the plaintiff, and says the horse was and has been wholly useless and of no value whatever. 2. That the note declared on was given and executed, in consideration of the sale by the plaintiff to the defendant of a horse, which the plaintiff then falsely

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and fraudulently represented to be sound, &c. The defendant avers that the plaintiff, by his promises, undertaking, and warranty, induced him to purchase and to execute the said note. He avers the said horse was unsound and diseased, negatives the representation of the plaintiff, and further says the horse was useless and of no value whatever. Issues upon these pleas were submitted to a jury, and a verdict rendered for the defendant. A motion for a new trial, founded on instructions given by the Court, was overruled, and judgment entered on the verdict.

The plaintiff below has appealed to this Court, and assigns two errors: 1. The Court erred in permitting the defendant to file pleas in that Court. 2. The Court erred in their instructions to the jury, as requested by the defendant.

[\*503] \*No objection having been made to the defendant's filing pleas in the Circuit Court, it is too late now to urge that in permitting it error was committed. The pleas may have been filed by consent, a presumption rather to be indulged than that of error by the Court. The objection seems to be untenable (1).

It appears, that it was proved that the consideration given by the defendant for the horse mentioned in the pleas, was a horse valued at fifty dollars and the writing obligatory sued on for \$100; and that this was all the testimony as to the consideration. It further appears from a bill of exceptions, that, on motion of the defendant, the Court instructed the jury, "That if they found that fifty dollars had been paid for the horse mentioned in the pleas, and that said horse was not worth more than was paid for him, they could not shut their eyes upon that fact, and had a right to take it into consideration, and say that the whole consideration for the writing obligatory had failed."

The pleas ground the defense on a failure of the consideration of the note sued on, through a fraudulent representation by the plaintiff of the soundness, &c., of the horse he sold (2). It does not appear, that evidence was offered to the jury establishing the fact that such fraudulent representation had



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been made. This was essential to maintain the pleas as a valid defense, and it was only from such proof that the jury could have come to the conclusion that the consideration of the note had failed. If, as appears from the record, the evidence we have noticed was all that was given as to the consideration, and none was given of the fraudulent representation of the soundness of the horse, it is very clear that the pleas were not sustained, and therefore no legal defense shown to preclude the plaintiff from recovering. The instruction given by the Court covers only a part of the defense; and although it may be supposed that the instruction was based upon evidence of fraud submitted to the jury, connected with that of the consideration, yet, upon much reflection, we are satisfied that we cannot presume, in support of the instruction, that such evidence was before the jury, and, consequently, we must view the instruction as unconnected with that evidence.

When the instruction is thus considered unconnected with other evidence, the question before us is brought within a very narrow compass. The instruction, whether considered as applicable to the pleas, or as presenting a general [\*504] proposition, was \*certainly incorrect, for it founds the failure of the consideration of the note upon a supposed inadequacy of the price. This question was not before the Court, and, even in chancery, the inadequacy must be such as shocks the conscience and amounts to conclusive and decisive evidence of fraud, to avoid a contract.

*Per Curiam.*—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

*J. H. Thompson* and *O. H. Smith*, for the appellant.

*C. Dewey*, for the appellee.

(1) Accord. *Tyler v. Denson*, Ante, p. 347.

(2) Vide *Wynn et al. v. Hiday*, Vol. 2, of these Rep., 123, and note; *Phillips et al. v. Bradbury et al.*, Ante, p. 388. The consideration of a bond could not be inquired into at common law; and payment of the bond could be therefore enforced, though the consideration was fraudulent. *Huston v. Williams*, Ante, p. 170. The statute opens the way for an inquiry into the consideration. R. C. 1831, p. 405.

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## NIXON v. BROWN, in Error.

THE affidavit of a party, in support of a motion for the continuance of a cause, on account of the absence of a witness; showed that the witness was material, that due diligence had been used to procure his testimony, and that there was good reason to expect that his attendance could be procured at the then next term of the Court. *Held*, that the party was entitled to a continuance, and the refusal to grant it was error (1).

(1) Vide *Gordon v. Spencer*, Vol. 2, of these Rep., 286, and note.

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## THORN and Others v. TYLER, Administrator.

ADMINISTRATOR.—An administrator may, under the statute, file a bill in chancery, instead of proceeding at law, against any person who intermeddles with or embezzles any of the goods, &c., of the intestate.

SAME.—A decree, in such a case, against two defendants for a certain sum, stated that they should be jointly and severally liable for the same. *Held*, that the words “jointly and severally,” &c., were merely surplusage, and did not render the decree objectionable.

[\*505] \*ERROR to the *Hendricks* Probate Court.

BLACKFORD, J.—This is a bill in chancery, filed in the Probate Court of *Hendricks* county, by *Tyler*, administrator of *Jourdan*, against *Thorn*, *Smith*, *Harris* and *Farlow*. The bill was taken *pro confesso* as to one of the defendants. The others filed their several answers. There are a variety of depositions taken in the cause. The Probate Court decreed in favour of the complainant for the sum of \$150.25, and stated in the decree that the defendants should be jointly and severally liable to the complainant for the amount. The decree is also for costs against the defendants.

The plaintiffs in error object to this decree on the ground that the Court had no jurisdiction of the cause. The allegations in the bill and the proofs are, that *Jourdan* died possessed of a certain quantity of whisky as his own property; that the complainant administered on his estate; that the defendants, after *Jourdan's* death, fraudulently took possession of the whisky, with a knowledge that it belonged to *Jourdan's* estate, and converted it to their own use. The objection made is, that the complainant's remedy is at law. This objection is without foundation. The statute on the subject is as follows: "That if any person shall unlawfully, and without authority, intermeddle with or embezzle any of the goods, chattels, rights, credits, moneys or effects of a decedent, such person shall be chargeable as an executor of his own wrong, and shall be liable to the action, as at common law, of the creditors of such decedent, or other person injured by such intermeddling and embezzlement, to the extent of the damages sustained thereby; or such creditor or other person injured as aforesaid, may sue such wrong-doer as in chancery, and compel him to make answer under oath concerning the premises, and on the final hearing, have decree according to justice and equity." R. C. 1831, p. 168. It appears to us that this statute gives the administrator, in a case like the present, the right to file a bill in chancery, if he prefer that mode of proceeding. He is a party injured by the conversion of the intestate's property, and is within the provision of the statute. The statutory provision referred to is contained in the 27th section of the act concerning Probate Courts, and shows conclusively the jurisdiction of the Probate Court in the case before us.

[\*506] \*On the merits of the cause, the decree is right.

The depositions are amply sufficient to support it.

The plaintiffs in error make an objection to the form of the decree. The decree, after stating the amount to be paid by the defendants below, goes on to say that they shall be jointly and severally liable for that amount. The objection is to the words *jointly and severally*, as inserted in the decree. This objection can not prevail. The words objected to are merely

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surplusage. They do not, in any respect, change the effect of the decree. A decree in chancery, or a judgment at law, against several defendants, renders them jointly and severally liable for the money. The execution issues against them jointly, but the amount may be collected from any one of them.

*Per Curiam.*—The decree is affirmed, with one *per cent.* damages and costs.

*C. Fletcher* and *W. Quarles*, for the plaintiffs.

*J. Eccles* and *C. C. Nave*, for the defendant.

END OF NOVEMBER TERM, 1834.



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See ESCAPE, 1; JOINDER; JUSTICE OF THE PEACE, 10.

1. Writing obligatory for \$200 to be paid in lumber; the lumber to be such as the payee should require, and to be delivered at a certain time and place, at the lowest cash price. *Held*, that debt **would** not lie on such an obligation.—*Cassady et al. v. Laughlin*.....134
2. Note under seal for the payment of \$220, one half payable in one year, and the other half in two years with interest. *Held*, that debt would not lie on the note, until the last payment was due.—*Farnham v. Hay*.....167

## DECREE.

See CHANCERY, 3-5; DOWER, 3, 4; MORTGAGE, 3, 4.

1. Bill in chancery, on a decree for a certain sum of money, rendered by a court of chancery in the State of *Kentucky*, in a case in which the defendant appeared, and in which there was a trial on the merits. *Held*, that the decree whilst unreversed—unless it was fraudulent, or the Court rendering it had no jurisdiction—was conclusive evidence

that the amount\* was due to the complainants, at the time the decree was rendered.—*Elliott et al. v. Ray*.....384

2. A decree determining the amount due on a mortgage, and authorizing a sale of the mortgaged premises, draws interest at the rate of only 6 per cent. per annum, though the debt previously drew interest, according to the contract, at a much higher rate.—*Wernwag v. Brown et al*.....457
3. A decree, in such case, must show with certainty the sum due to the complainant, and not leave the amount to be afterwards ascertained by the calculations of any ministerial officer.....*Ibid*.
4. A decree against two defendants for a certain sum, stated that they should be jointly and severally liable for the same. *Held*, that the words "jointly and severally," &c., were merely surplusage, and did not render the decree objectionable.—*Thorn et al. v. Tyler*.....504

## DEED.

See CONVEYANCE.

## DELIVERY-BOND.

See BOND, 6; PLEADING, 1, 2.

## DEMAND.

See AGREEMENT, 3; BOND 5; PRINCIPAL AND AGENT, 1, 2.

## DEMURRER.

See PLEADING, 10, 12; SLANDER, 3.

## DEPOSITIONS.

See EVIDENCE, 2.

## DETINUE.

A verdict in detinue was as follows: "We, the jury, find the property named in the declaration to be in the plaintiff, and find the value thereof to be sixty dollars." *Held*, that the judgment should be arrested, the verdict not showing an unlawful detainer of the property.—*Crouch v. Martin*.....256

## DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS, 3.

## DISSEISIN.

To sustain an action of disseisin the plaintiff must, as in ejectment show

a legal title, and such a title is not conveyed by a land office certificate.—*Mosier v. Smith*.....132

### DISTRESS.

1. Sheaves and shocks of corn are exempt from distress for rent.—*Given v. Blann*..... 64
2. When a demurrer to an avowry for rent is overruled, the jury impaneled, under the statute, in such case, must find the value of the distress as well as the arrears of rent, or the defendant can not have judgment for the rent due.....*Ibid.*
3. A tenant contracted to deliver, as rent, one-third of the corn he should raise on the premises. *Held*, that the remedy by distress does not lie in such a case.—*Clark v. Fraley*..264

### DIVORCE.

1. Suits for divorces must, under the statute, be instituted in the courts of common law, and not in the courts of chancery.—*Varner v. Varner*.....163
2. If a man apply for a divorce on account of the adultery of his wife, and it be proved that, after the offense complained of, he himself lived in adultery with another woman, his application must fail.—*Christianberry v. Christianberry*...202
3. *Semble*, that a petition for a divorce on account of adultery should state the time and place when and where the offense was committed.....*Ibid.*

### DOWER.

1. The wife of a *cestui que trust* is not dowerable by the *English* law of an estate to which her husband had only an equitable title during the coverture; nor is a widow dowerable, by that law, of an estate mortgaged *in fee* by her husband before marriage, and which was unredeemed at his death.—*M<sup>r</sup> Mahan v. Kimball*....1
2. The *Indiana* statute has materially changed the law on this subject. The widow is here entitled to dower in "all the lands, tenements, and hereditaments, either legal or equitable, whereof her husband, or any other person to his use, was seised at any time during the coverture," and she has, consequently, a right of dower in an equity of redemption on a mortgage *in fee*.....*Ibid.*
3. The clause in the statute saying that the widow's dower shall not be con-

sidered as sold or extinguished by a sale of her husband's property by virtue of any decree, execution or mortgage to which she is not a party, has no relation to a decree, &c., existing previously to the marriage. ....*Ibid.*

4. A person having executed a mortgage *in fee* on his estate married, and afterwards died without having redeemed the mortgage. Two of the three payments, to secure which the mortgage was given, were due and unpaid at the time of the mortgagor's death. The widow caused her dower in the estate to be assigned to her, by a commissioner, under the statute. The mortgagee filed a bill in chancery against the heir and personal representative of the mortgagor for a foreclosure and sale of the mortgaged premises, and a decree was rendered for the complainant by an agreement of the parties. This decree required that the premises should be exposed to sale by a commissioner according to law, and that, if they would not sell for a sufficient sum to pay the mortgage-money and costs, they should be delivered to the mortgagee in full satisfaction of the debt. The commissioner afterwards, not being able to sell the premises for a sufficient sum to pay the mortgage-money, conveyed them to the mortgagee, according to the direction of the decree. *Held*, that the widow of the mortgagor was not, under these circumstances, entitled to dower in the premises.....*Ibid.*
5. The claim of a widow to dower in an equitable estate, under the statute, can be enforced only by a suit in chancery .....*Ibid.*
6. The assignment of dower by commissioners, under the statute, limits the extent of dower, but does not confer a legal right to it.....*Ibid.*

### E.

### EJECTMENT.

See OCCUPYING CLAIMANT; TENANTS IN COMMON.

In ejectment, if the declaration be filed, notice given to the defendant, and a copy of the declaration served on him, ten days before the next term, the plaintiff must be ready at that term for trial, unless he can show a good cause of continuance.—*Doe d. Gallion v. Griffin*.....136



## ELECTION.

See JUSTICE OF THE PEACE, 4.

## EQUITABLE TITLE.

See DOWER, 1, 2, 4, 5.

## ERROR.

See CHANCERY, 5; CONTINUANCE; COSTS, 3; EVIDENCE, 10; INSTRUCTIONS TO JURY; JURY, 3, 6, 7; NEW TRIAL, 1; PRACTICE, 6, 7.

## ESCAPE.

See SHERIFF, 3.

1. An action of debt lies in this State against a sheriff for an escape on execution, the *English* statutes authorizing such an action being in force here.—*Gwinn v. Hubbard*..... 14
2. The sheriff is liable for the escape of a party taken on execution in a civil action, and legally in his custody, though there be no gaol in the county.....*Ibid*.
3. A *scire facias* can not issue, either at common law or by statute, against a sheriff or constable for an escape.—*Hall v. Johnson*.....363
4. An execution-creditor, in order to recover against the sheriff or constable for an escape, must aver and prove the existence of a judgment against the execution-debtor....*Ibid*.

## EVIDENCE.

See ARBITRATION, 2; ATTACHMENT, 3; CHANCERY, 1, 4, 6; CONDITION PRECEDENT; DECREE, 1; EXECUTORS AND ADMINISTRATORS, 4, 5; MALICIOUS PROSECUTION, 2, 4, 7, 8, 10; PARTNERSHIP, 5, 7; PLEADING, 11; PRACTICE, 4; PRINCIPAL AND AGENT, 5, 6; SHERIFF, 2; SLANDER, 5, 9-13; WITNESS.

1. The plaintiff produced a receipt in evidence, and proved its execution, but did not offer to read it until his closing argument to the jury: the reading of the receipt was then objected to, because it had not been previously read. *Held*, that the objection was insufficient.—*Harter v. Seaman* ..... 27
2. The circumstance that a deposition which had been three days on file had not been opened before the jury were sworn is not of itself a sufficient objection to its being afterwards opened and read in evidence....*Ibid*.
3. The recorded plat of a town, showing the width of a certain street, was

introduced as evidence to prove the width of that street. *Held*, that parol evidence to show that the proprietor of the town intended the street to be of a different width than was shown by the plat, was inadmissible.—*Wood v. Mansell et al.*.....125

4. On a writ of inquiry of damages, in a case of breach of contract as to the performance of certain work, the defendant may, in mitigation of damages, prove that a part of the work had been done, under the contract, to the plaintiff's benefit.—*Cox et al. v. Way*.....143
5. A promised in writing, on the back of a promissory note held by *B*, to pay him the amount of the note if not collected from the maker, but the consideration of the promise was not specified in the written promise. *Held*, that in a suit by *B* against *A* on the promise, the writing signed by *A* was legal evidence; but, *quere*, whether it was sufficient of itself to support the action?—*M'Coskey et al. v. Deming*.....145
6. If any circumstances can be conceived under which testimony admitted by the Circuit Court would be admissible in the case, and the record does not show the ground on which it was received, its admission will be presumed to be correct.—*Rogers v. Lamb*.....155
7. Parol evidence admitted to explain a written agreement, &c.—*Dickson v. Kelsey*.....189
8. Action on the case for causing water to flow back on the plaintiff's land, and thus producing a loss of his building materials on the premises. Plea, not guilty. *Held*, that the plaintiff could not prove, in aggravation of damages, a loss of building materials on the land, if they belonged to the plaintiff and another in partnership.—*Trimble v. Gilbert* .....218
9. The defendant, in an action for an assault and battery, can not prove, in mitigation of damages, that the plaintiff had previously slandered him, if there had been time between the provocation and the assault for deliberate reflection.—*Fullerton v. Warrick*.....219
10. A judgment ought not to be reversed on account of the improper admission of evidence, if the verdict is right independently of that evidence.—*The State v. Beem et al.*.....222

11. The transcript of a record of the District Court of the *United States* for this State, under the seal of the Court, and certified by the clerk to be a complete copy of the record, is admissible as evidence in the courts of this State.—*Adams v. Lisher*...241
12. The admissions made by a party, examined under oath on a trial before a justice, can not be proved in the Circuit Court, on appeal, the party being in court on the trial of the appeal, and not there examined.—*Carter v. Buckner*.....314
13. The defendant against whom a judgment had been rendered by a justice of the peace, appealed to the Circuit Court. The transcript not being filed in time by the justice, the appeal was dismissed, and the appellant sued the justice for his neglect. *Held*, that the plaintiff in this case might prove admissions, made on the trial of the original suit, by the plaintiff there, tending to show that there was no foundation for that suit.—*Ingram v. Plasket* .....450
14. The justice, in this case, had filed the appeal-bond in the clerk's office after the limited time. *Held*; that the circumstance of his having filed the bond, precluded him from requiring the plaintiff to prove its execution.....*Ibid*.
15. In a suit on a note, evidence of the plaintiff's agreement to forbear to sue for a certain time, &c., is admissible under the general issue.—*M'Clelland v. Quarles*.....459

## EXECUTION.

See BOND, 6, 8; CHANCERY, 8; DOWER, 3; ESCAPE; PRINCIPAL AND SURETY, 1; REPLEVIN, 2; SALE; SHERIFF'S SALE.

1. A *capias ad satisfaciendum* cannot be issued by the clerk of a Circuit Court, nor by a justice of the peace, unless a *feri facias* be first issued and returned *nulla bona*, or an affidavit be made by the plaintiff that the debtor is about to leave the State, &c.—*Gwinn v. Hubbard*.....14
2. A justice of the peace, having rendered judgment for a certain sum against a defendant, issued an execution thereon, commanding the constable to levy the amount of the defendant's goods, and, for want of goods, to take his body, &c. *Held*, that this writ gave no authority to

- the constable to arrest the defendant, nor to the sheriff to receive or detain him in custody.....*Ibid*.
3. A carding machine, situated in a building erected for the purpose of carrying on carding, ready to be put in operation, and standing on the floor in its usual place of operation, but not fastened to the building, is personal property, and subject to an execution issued by a justice of the peace.—*Taffe v. Warnick*.....111

## EXECUTORS AND ADMINISTRATORS.

See CONVEYANCE, 5; WITNESS, 1.

1. A person set out from this State for *New Orleans* on a trading voyage, leaving his wife and five small children in a destitute situation. His debts exceeded the value of his property, and he did not live to return home. Within a year after his departure, and before his wife had any certain knowledge of his death, she had used the property left by him in the support of the family and in the payment of his debts. *Held*, that, under these circumstances, the widow was not liable, as an executrix *de son tort*, to the creditors of her husband.—*Brown v. Benight et ux*.....39
2. A bill in chancery, filed by an administrator on a cause of action which accrued to the intestate in his life-time, was dismissed upon the merits. *Held*, that the defendant was not entitled to a decree for costs.—*Cooper v. Thatcher et al.*...59
3. An administrator cannot be sued for the *devastavit* of his intestate, by an administrator *de bonis non* of the first intestate.—*Anthony v. M'Call*.....86
4. Letters testamentary or of administration granted in another State were not recognized here, by the statute of 1824, until recorded in a Circuit Court of this State; but they are now so recognized, under the statute of 1831, upon their being filed with the clerk of the court in which they are to be introduced.—*Naylor v. Moody et al.*.....92
5. Debt on an executor's bond against the administrators of the surety. The declaration did not aver that the relators were entitled to recover as heirs, legatees, or creditors of the testator, nor that assets subject to the claim had come to the hands

- of the executor; but it stated, that a decree had been recovered by the relators in a suit against the executor. Pleas, performance by the executor, *plene administravit* by him, &c. Issues on the pleas, and verdict for the plaintiff. *Held*, that the defects in the declaration, as to the want of the averments mentioned, were cured by the verdict. *Held*, also, that the decree referred to in the declaration, without a record of the previous proceedings, was not admissible as evidence, and, *semble*, that independently of that objection, the decree was inadmissible.—*Nicholson et ux. v. Carr et al.*.....104
6. In chancery, the defendant, an administrator, having filed his answer, attended no further to the cause, and a final decree, on bill, answer, and proofs, was rendered against him. *Held*, that there was no error in the proceeding.—*Murdock v. Holland's Heirs.*.....114
7. Mistakes, &c., in the settlement of administrators' accounts in the Probate Court, may be corrected by a court of chancery.....*Ibid.*
8. If an executor or administrator sue on a cause of action, arising in the life-time of the testator or intestate, and the defendant plead the general issue, or any other plea in bar, the plaintiff's character of executor or administrator is admitted.—*Pollard v. Buttery.*.....239
9. If an executor or administrator, necessarily suing in his representative character, suffer a nonsuit in consequence of an illegal instruction, given by the Court to the jury against his right to recover, he is not liable for costs *de bonis propriis*.....*Ibid.*
10. A note payable to A, administrator of B, is due to A in his own right; and he may sue on it without naming himself administrator.—*Barnes v. Modisett et al.*.....253
11. If, in such case, the suit be in the name of A, administrator of B, the words, "administrator of B" may be considered as surplusage.....*Ibid.*
12. The statute of 1822, enacting that no mispleading, or lack of pleading, should *thereafter* render any executor or administrator personally liable, has no application to a judg-

- ment rendered previously to the statute.—*Martindale v. Moore.*.....275
13. Courts of law and equity have concurrent jurisdiction, as to suits against heirs, executors, or administrators, for the debts of the decedent.—*Martin v. Densford.*.....295
14. If an administrator consent to the sale, by heirs, of the real estate of the intestate, he divests himself of any right, which he might otherwise have had under the statute, to make such estate assets, in case of a deficiency of the personal property.—*Pell v. Farquar.*.....331
15. An administrator may, under the statute, file a bill in chancery, instead of proceeding at law, against any person who intermeddles with or embezzles any of the goods, &c., of the intestate.—*Thorn et al. v. Tyler.*.....504

## EXTORTION.

- In an indictment for extortion where nothing was due, there must be an averment that nothing was due; and if the charge be for taking more than was due, the indictment must show how much was due.—*The State v. Coggsell.*.....54

## F

## FALSE IMPRISONMENT.

See TRESPASS, 6-9.

## FALSE RETURN.

See SHERIFF, 1, 2.

## FEES.

- Scire facias* against a surety on a forfeited recognizance for the principal's appearance to an indictment. Previously to judgment on the *scire facias*, the principal was surrendered in discharge of his bail, and judgment was rendered against the surety, conformably to the statute, for the costs. *Held*, that the prosecuting attorney's fee, in such case, is two dollars and fifty cents.—*The State v. Armstrong.*.....42

## FIXTURES.

See EXECUTION.

## FORCIBLE ENTRY AND DETAINER.

1. Though a person who has had quiet possession of an estate for three years, and whose interest re-

mains undetermined, is protected by statute from the action of forcible entry and detainer; yet the declaration in this action need not deny the existence of such a possession or the continuance of the estate.—*Ward et al. v. Crane et al.*.....393

2. The circumstance, that the forcible entry and detainer complained of, appears by the declaration to have been committed beyond the time limited by the statute, is no cause for arresting or reversing the judgment for the plaintiff.....*Ibid.*
3. In an action of forcible entry and detainer, the verdict for the plaintiff in the Circuit Court, on appeal, must be signed by all the jurors.....*Ibid.*

### FORECLOSURE.

See MORTGAGE, 3-6.

### FORGERY.

See SLANDER, 6, 7.

### FRAUD.

See PARTNERSHIP, 1, 2; PLEADING, 11.

### FRAUDS, STATUTE OF.

See EVIDENCE, 5; PARTNERSHIP, 4; SHERIFF'S SALE, 6.

### FRAUDULENT CONVEYANCE.

1. The holder of a title-bond assigned it, to defraud his creditor, to a third person, and the fraudulent assignee, thereupon, obtained a conveyance of the land. *Held*, on a bill filed by the creditor, who had obtained a judgment for his debt against the assignor, that the land was subject to the judgment.—*Wayman et al. v. Hardin*.....26
2. *A* being indebted to *B* purchased a tract of land, &c., and, with the fraudulent intent of securing it against *B*'s claim, took the conveyance in the name of *C*, the infant son of *A*. *Held*, that *B*, having obtained a judgment against *A* for the debt, might, by a suit in chancery, subject the land to the payment of the judgment.—*Demaree et al. v. Driskill*.....115
3. A debtor to defraud his creditors, conveyed his real estate to a person with notice of the fraud. *Held*, that a *bona fide* purchaser, for a valuable consideration, from the fraudulent grantee, having paid the

purchase-money, and received a deed, before notice of the fraud, will hold the estate against the creditors of the grantor. *Aliter*, if the purchaser from the fraudulent grantee had notice of the fraud, before the payment of all the purchase-money.—*Dugan et al. v. Vattier et al.*.....245

4. The creditors of a deceased debtor, having obtained separate judgments against his administrator, may unite in a bill in chancery to set aside the intestate's fraudulent conveyance of real estate, and subject it to the payment of their judgments.....*Ibid.*

### FRAUDULENT JUDGMENT.

*A* judgment was confessed to defraud a creditor, on which an execution was issued, and a sale made of the debtor's real estate—the purchaser having notice of the fraud. On a bill filed by the creditor intended to be defrauded (who, in the mean time, had obtained a judgment for his demand), the proceedings were set aside.—*Platt et al. v. Judson*..235

### FRAUDULENT SALE.

See SHERIFF'S SALE, 3.

*A* mortgaged certain goods to *B* to secure the payment of a *bona fide* debt, but continued in possession of the goods with the mortgagee's permission, and used and disposed of them as his own. The mortgage stated that the goods were delivered to the mortgagee in his own right, subject to be redeemed on the payment, &c. *Held*, that under these circumstances the mortgage was fraudulent and void as to the mortgagee's creditors.—*Jordan v. Turner*..... 309

### G.

### GAMING.

1. In an indictment for permitting gaming in a licensed grocery, it is not necessary to set forth the name of the game that was played.—*The State v. Dole*..... 294
2. In an indictment for gaming at a tavern or any other place, it is unnecessary to state the particular game played.—*The State v. Bougher*, ..... 307



GAOL.

See ESCAPE, 2; PRISON LIMITS.

GIFT.

A gift, by parol, of real estate by *A* to *B*, his son—the donee being in possession, and having made improvements—vests in *B* no interest in the property which a court of law or equity can recognize.—*Adamson v. Lamb*..... 446

GUARDIAN AND WARD. w

See CONVEYANCE, 5; INFANCY, 1.

H.

HIGHWAY.

See TRESPASS, 1.

HUSBAND AND WIFE.

See DIVORCE; DOWER.

1. A feme covert may, by statute, join with her husband in the execution of a conveyance of real estate, but she can not be bound by any of the covenants contained in the conveyance.—*Aldridge v. Burlison et ux*. 201
2. In an action of slander by a husband and wife, the declaration must not conclude to the damage of the wife only, but to the damage of the husband and wife.—*Throgmorton v. Davis et ux*..... 383

I.

ILLEGITIMATE CHILDREN.

See TRESPASS, 6, 7.

INCAPACITY.

See CONVEYANCE, 1-3.

INDENTURE.

See APPRENTICE.

INDICTMENT.

See EXTORTION; GAMING; LARCENY; MALICIOUS TRESPASS; NAVIGABLE STREAMS, 4; RECEIVING STOLEN GOODS.

The description of an offense in an indictment, in the language of the statute defining it, is sufficient.—*The State v. Bougher*..... 307

INFANCY.

See PROCHEIN AMY.

1. If the plaintiff is an infant, the form of the writ may be the same as in other cases, but the declaration

must be by guardian or next friend.

- Bouche v. Ryan*..... 472
2. A defendant, by obliging the plaintiff to give security for costs, does not waive the right to plead the infancy of the plaintiff in abatement..... *Ibid*.
3. An infant plaintiff is not liable for costs..... *Ibid*.

INSOLVENCY.

See SHERIFF, 1.

INSTRUCTIONS TO JURY.

See MALICIOUS PROSECUTION, 3.

1. The instructions to the jury, having relation to the cause, must be presumed correct if the record does not show the testimony on the subject. *Rogers v. Lamb*..... 155
2. If instructions to the jury be asked for and refused, and the record do not show that there was any evidence to which they were applicable, they must be presumed to have been irrelevant, and consequently improper..... *Ibid*.
3. A defendant can not ask the Court, under the statute, to instruct the jury to disregard a count in the declaration on account of its being defective, if the defect would be cured by a general verdict for the plaintiff. *Turpin v. Remy*..... 210
4. Erroneous instructions to the jury cannot be assigned for error if they were not applicable to the case, and could not injure the party complaining of them.—*Stuard v. Patterson*..... 353
5. The refusing to give instructions to the jury, unless the record show them to be relevant to the issue, can not be assigned for error.—*Duignan v. Wyatt et al*..... 385
6. It is error in the Court to refuse to give a particular instruction to the jury, if, in law, the party is entitled to it.—*Taylor et al. v. Hillyer*... 433

INTEREST.

See DECREE, 2.

1. When a payment in part of a demand is made, and the payment exceeds the interest then due, the payment is applied in discharge of the interest, and the surplus goes to the credit of the principal. But if the payment is less than the interest due, the principal remains on interest until payments exceeding the interest are made. and then the pay-

- ments are applied as above mentioned.—*Wasson v. Gould et al.*.... 18
2. *A* gave his promissory note to *B* for an antecedent debt, and afterwards confessed a judgment, without any qualification, in favour of the payee for the amount of the note, and the interest then due on it. *Held*, that *B* could not be relieved in chancery from the interest charged on the note and included in the judgment, on the ground that, by a parol contract when the note was given, no interest was to be charged.—*Stutsman v. Stutsman*..... 231
3. Under the statute of 1824, if money was lent at a higher rate of interest than *six per cent. per annum*, no interest at all could be recovered; and if, in such case, the usurious interest, or a part of it, had been paid, such payment was deducted from the principal, and the lender recovered the balance, without any calculation of interest.—*Tyler et al. v. Denson*..... 347
4. Debt on a promissory note for the payment of money on a specified day, and if not paid when due, interest to be paid at a certain rate. *Held*, that a special averment in the declaration of the non-payment of the interest was not essential to a recovery of the interest. *Held*, also, that the note not being paid when due, drew interest at the specified rate from the time the note became due.—*Wernwag et al. v. Mothershead et al.*..... 401

### INTOXICATION.

See CONVEYANCE, 1-3.

### ISSUES.

See JURY, 8; PRACTICE, 1.

### J.

### JOINDER.

In debt, a count on a speciality and one on simple contract may be joined. *Farnham v. Hay*..... 167

### JOINT CONTRACT.

See CONTRACT, 5; PARTIES, 1.

### JUDGMENT.

See BOND, 8; COUNTY COMMISSIONERS, Board of, 1; TRESPASS, 3; WARRANT OF ATTORNEY.

In an action in the name of the State on the relation of *A* against *B* and

*C*, the judgment was as follows: "It is therefore considered by the Court that the said defendants go hence without day, and that *he* also recover his costs and charges in this behalf expended, and the plaintiff in mercy," &c. *Held*, that under the statute the judgment should have been against the relator for costs, and in favour of both the defendants, but that the mistakes as to these matters were merely clerical, and might have been amended at any time.—*The State v. Hood et al.*..... 351

### JURISDICTION.

See APPEAL, 1-3; CHANCERY, 8; DIVORCE, 1; EXECUTORS AND ADMINISTRATORS, 7, 13, 15; JUSTICE OF THE PEACE, 2, 6-9; TRESPASS, 6-8; VENDOR AND PURCHASER, 2.

The Circuit Court can not take cognizance of a matter of controversy or suit, unless the same be brought before it by process of law or other legal proceedings.—*Hoover v. Hanna*..... 48

### JURY.

See MALICIOUS PROSECUTION, J.

1. *Semble* that a jury may, by leave of the Court, seal up their verdict, separate for the night, and deliver in the verdict next morning; but that if, in the interim, any of the jurors be improperly practiced upon, the verdict will be set aside.—*Harter v. Seaman*..... 27
2. If the board doing county business select, from the list of taxable persons, the names of the petit jurors, according to its discretion, instead of causing their names to be drawn from a box by the clerk, according to the statute, out of the whole number selected, it is a good cause of challenge to the array.—*Jones v. The State*..... 37
3. A jury, by consent of the parties and the Court, sealed up their verdict in the evening, separated, met again in the morning and gave it in. The verdict being defective, the jury retired by direction of the Court, reconsidered it and returned a correct one. *Held*, that this proceeding was not erroneous.—*Tyrell et al. v. Lockhart*..... 136
4. If the names of the petit jurors have not been recorded by the clerk, conformably to the statute, it is a

- good cause of challenge to the array.  
*Mitchell v. Likens*..... 258
5. The names of the petit jurors must be recorded, as prescribed by statute, or the array may be challenged. *Mitchell et al. v. Denbo*.....259
  6. If it appear in the record that the jury were sworn, the omission of the words "the truth to speak in the premises," cannot be assigned for error.—*Judah v. M'Namee*...269
  7. Same point decided.—*Mann et al. v. Clifton*.....304
  8. The practice of swearing a jury as well to try the issue in fact, as to inquire of the damages on an issue in law previously found for the plaintiff, obtains only in cases where the decision of the issue in law entitles the plaintiff to damages, without regard to the trial of the issue in fact.—*Swann v. Rary*....298

### JUSTICE OF THE PEACE.

See APPEAL; ARBITRATION, 3; EVIDENCE, 12-14; EXECUTION; LIMITATIONS, Statute of, 2; TRESPASS, 6-9; WITNESS, 3, 4.

1. If a justice of the peace, in the discharge of any of his ministerial or judicial duties, act corruptly to the injury of a party, his conduct is a breach of the condition of his official bond.—*The State v. Flynn et al.*.....72
2. To an action of debt before a justice of the peace in *Monroe* township, *Washington* county, the defendant pleaded that he was not resident in that township, nor was the debt contracted there. *Held*, that the plea was insufficient.—*Nelson v. Zink*.....101
3. A defendant in the Circuit Court moved for the dismissal of an appeal from the judgment of a justice in his favor, on the ground that the justice had permitted the plaintiff to amend his cause of action after the commencement of the trial. The motion was overruled, and judgment rendered for the plaintiff. *Held*, that it must be presumed, nothing appearing to the contrary, that the amendment was only as to some matter of form, and of course not liable to any objection.—*Moore v. Ayres*.....108
4. The board doing county business may, under the statute of 1831, order an election of a justice of the peace to supply a vacancy which

- had previously occurred; but they have no authority to make such an order in anticipation of a vacancy. —*Nooe v. Bradley et al.*.....158
5. The pleadings before justices of the peace cannot be objected to for want of form: *aliter*, as to substantial defect.—*Hall v. Johnson*.....363
  6. Whenever, in a suit commenced before a justice of the peace, it appears from the pleadings, or evidence, or agreement of the parties, that the title to real estate will come in question; the suit must be dismissed for want of jurisdiction.—*Parker v. Bussell*.....411
  7. If an action of assumpsit for use and occupation be commenced before a justice of the peace, and the declaration show that the plaintiff claims as an assignee of the reversion, the plea of non-assumpsit, by putting the plaintiff's title in issue, deprives the justice of jurisdiction of the cause.—*Smith v. Harris*...416
  8. The declaration in such a suit so commenced, did not show whether the plaintiff claimed as the immediate landlord, or as an assignee. The defendant pleaded the general issue; and the evidence on the trial in the Circuit Court, on appeal, disclosed the plaintiff's claim to be as assignee. *Held*, that on such disclosure, the suit should be dismissed for the want of jurisdiction of the justice. ....*Ibid.*
  9. A magistrate may have jurisdiction of a suit, though the plaintiff's account exceed \$100, if it be reduced by credits below that sum, and the balance only be demanded.—*Newland v. Nees*.....460
  10. An action of debt may be brought in this State, upon the judgment of a justice of the peace in another State: but a *scire facias* to procure the award of an execution on such a judgment does not lie.—*Hoagland v. Rogers*.....501

### L.

### LANDLORD AND TENANT.

#### See DISTRESS.

- A* leased to *B* for a number of years a dwelling-house and two lots at a certain annual rent, and covenanted in the lease to make some additions to the buildings, and furnish some furniture for the house. The tenant entered into and occupied the

premises; and the landlord sued for two years' rent. *Held*, that the landlord's not having made the additions, &c., as agreed on, was no bar to the action.—*Bryan v. Fisher*..316

## LAND OFFICE CERTIFICATE.

See DISSEISIN; MORTGAGE, 2.

## LARCENY.

See SLANDER, 4, 5, 8.

1. An indictment for larceny, charging that the goods stolen were the property of *A*, is not sustained by proof that they belonged to *A* & *B* as partners, and that they were, at the time of the larceny, in *A*'s possession.—*Hogg v. The State*...326
2. Indictment. The first count, after stating that *A* *B* had committed larceny, at, &c., on, &c., charged the defendant with then and there aiding and abetting *A* *B*, &c. The second count charged the defendant as an accessory to the larceny before the fact. Plea, not guilty. Verdict and judgment against the defendant. *Held*, 1. That the want of an averment in the indictment, that the principal had been convicted, was no ground for arresting the judgment. 2. That an accessory must be tried after the conviction of the principal, or be tried with him. 3. That if the record do not show but that the principal had been convicted before the trial of an accessory, there is no ground for the latter to object, in an appellate court, that there had been no such conviction.—*Harty v. The State*.....386

## LEASE.

See LANDLORD AND TENANT.

## LIMITATIONS, STATUTE OF.

See PRINCIPAL AND AGENT, 3; SHERIFF, 1.

1. The payee of a note sold it before it was due, affirming the maker to be solvent; and the purchaser afterwards sued the seller in assumpsit, in consequence of the maker's insolvency, to recover back the money paid for the note. *Held*, that if five years had elapsed from the time the note became due, before the commencement of the suit, the statute of limitations might be pleaded.—*Hoyt v. Reed*.....368

2. The statute of limitations may be pleaded in a suit before a justice of the peace.....*Ibid*.

## LOST BOND.

See BOND, 1, 2.

## M.

## MALICIOUS PROSECUTION.

1. In an action of malicious prosecution for causing the plaintiff to be indicted, &c., he may challenge any of the jurors who were on the grand jury that found the indictment.—*Rogers v. Lamb*.....155
2. In an action of malicious prosecution, the defendant's character is not in issue, and he cannot call witnesses to support it.....*Ibid*.
3. In an action of malicious prosecution for causing the plaintiff to be indicted, the Court is not necessarily bound to instruct the jury, that, unless they believe the defendant guilty of perjury, they must find for him, though his evidence was necessary to the finding of the indictment.....*Ibid*.
4. In an action for maliciously prosecuting the plaintiff for a criminal offense, the affidavit on which the warrant for the arrest issued, is admissible evidence for the plaintiff, if it authorized the warrant.—*Turpin v. Remy*.....210
5. The declaration, in such a case, need not aver that the charge was made under oath; but it ought to state the offense for which the plaintiff was prosecuted, by the name or description given to it by law...*Ibid*.
6. An action of malicious prosecution can only be supported, in cases where the prosecution was under the regular process and proceedings of some judicial officer or tribunal; if the proceedings complained of were extra-judicial, the remedy is trespass.....*Ibid*.
7. *A* charged *B* before a justice with having committed perjury, on a trial between them, in a justice's court; upon which charge a warrant issued against *B*, and he was thereon arrested. For this arrest *B* brought an action of malicious prosecution against *A*. *Held*, that the original affidavit and warrant were admissible evidence for the plaintiff. *Held*, also, that after the defendant had given in evidence



- the record of the cause in the justice's court, in which he had recovered, the plaintiff might show that, on appeal, the judgment was against the defendant. *Held*, also, that in such case, the declaration need not show the charge to have been under oath, nor the time when the perjury charged was committed.—*Conduit v. Dicken*.....216
8. The declaration in an action of malicious prosecution, only professed to set out the substance of the prosecution, which was for a misdemeanor. *Held*, that the record of acquittal could not be objected to as evidence, for a variance in a mere matter of form, between it and the proceedings stated in the declaration.—*Adams v. Lisher*.....241
9. If, in an action of malicious prosecution, the plaintiff be proved guilty of the offense for which he had been prosecuted, he cannot recover, though his guilt was not known to the defendant at the commencement of the prosecution.....*Ibid*.
10. In an action for a malicious prosecution, the plaintiff's acquittal of the prosecution is not *prima facie* evidence of the want of probable cause.—*Adams v. Lisher*.....445
1. In malicious prosecution, one of the counts stated that the defendant falsely, &c., charged the plaintiff with perjury, and, on such charge, falsely and maliciously procured him to be arrested and imprisoned for, &c., and at the expiration, &c., the plaintiff was duly acquitted. *Held*, that this was a count in malicious prosecution and not in trespass.—*M'Glenery v. Keller*.....488
- before his term of office expired, and that he had delivered the precept to his successor.—*The State v. Leavell et al*.....117
2. There was an assessment of militia fines in 1825, against persons conscientiously scrupulous of bearing arms, another in 1826, and another in 1827. *Held*, that these fines could not be collected by means of one list including them all, but that there should be a distinct list for each assessment.....*Ibid*
3. The declaration against a sheriff for not collecting a list of such fines should show the name of each person fined, and the amount of his fine; that the fines were recorded in the regimental book separate from other fines, and that the list was signed and sealed by the senior officer of the Court of Appeals... *Ibid*.
4. A suit for the benefit of the board of trustees of a county seminary will not lie against their predecessor in office, for the money in his hands collected in the county of persons conscientiously scrupulous of bearing arms, as an equivalent for militia duty—the seminary not being entitled to the money.—*Mitchell et al. v. The State*..... 391

## MITTIMUS.

A person being imprisoned by virtue of a mittimus issued by a justice of the peace, which did not show the cause of commitment, brought an action of trespass against the justice, the constable who executed the mittimus, and the persons who assisted the constable. *Held*, that the mittimus was no justification for the defendants.—*Hiday et al. v. Gilmore*. 48

## MORTGAGE.

See DECREE, 2, 3; DOWER, 1-5; FRAUDULENT SALE.

1. A conveyed a tract of land to B in consideration of a certain sum of money, and B on the same day obligated himself by a bond to reconvey the land to the grantor on the repayment of the purchase-money within a certain time. *Held*, that these two instruments of writing, taken together, amounted to a mortgage.—*Harbison v. Lemon et al*... 51
2. A was B's surety for a debt due to C. To secure A as to his suretyship, B assigned to him a land office certificate, taking from him a bond for

## MALICIOUS TRESPASS.

An indictment for a malicious trespass need not state the means used to effect the injury.—*The State v. Merrill*.....346

## MESNE PROFITS.

See OCCUPYING CLAIMANT, 2.

## MILITIA FINES.

1. In an action against a sheriff for refusing to collect militia fines, and for not returning the precept requiring him to collect them, it is not a sufficient defense to state generally, that the defendant had not time to make the collection

a re-conveyance, on re-payment, &c. *A* paid the debt to *C*, and afterwards sold and transferred the certificate to *D*, who had notice of *B*'s equity. *Held*, that *B* had a right, in equity, to redeem, &c.—*Holcroft et al. v. Hunter*.....147

3. A joint mortgage to two persons to secure debts due to them severally, may be foreclosed on a joint bill filed by the mortgagees.—*Shirkey v. Hanna et al.*.....403

4. It is no objection to a decree for the complainants in such a case, that all the land mortgaged is ordered to be sold.....*Ibid.*

5. On a bill to foreclose a mortgage, all the mortgaged premises may be ordered to be sold.—*Andrews v. Jones et al.*.....440

6. A mortgage, given to secure the payment of a certain debt by installments, contained an agreement that on default in the payment of any one installment the whole debt should be then payable, subject to a deduction of interest from the payment of the money to the time when it was to have been paid had no default occurred. *Held*, that on the non-payment of any installment when due, a bill of foreclosure might be filed. *Held*, also, that the liability to pay the whole debt, upon any such default could not be considered as a penalty.....*Ibid.*

## N.

### NATURAL AFFECTION.

See CONTRACT, 4; GIFT.

### NAVIGABLE STREAMS.

See PLEADING, 6.

1. The acts of the State legislature of 1829 and 1831, making it a penal offense to erect or continue any obstructions in certain navigable streams within the State, are constitutional and valid.—*Cox v. The State*.....193

2. The public have a right of way in navigable streams within the State, which right can not be interrupted by the owners of the banks of such streams.....*Ibid.*

3. Neither the State legislature nor Congress can authorize the erection of obstructions in any navigable stream within the State.....*Ibid.*

4. An indictment for obstructing a

navigable stream must state the name of the stream, that the part obstructed is navigable, and that the bed has not been surveyed and sold as land by the *United States*; it must, also, state the place where the obstruction is situated, that the passage of boats is obstructed, &c.....*Ibid.*

## NEW TRIAL.

1. If a new trial—moved for on account of the insufficiency of the evidence to support the verdict—be refused, and the refusal assigned for error, the impropriety of the verdict must appear beyond all doubt, or this Court will not interfere. *Mann et al. v. Clifton*.....304

2. On a motion for a new trial, because of a witness' intoxication and consequent absence at the time of trial, the witness' affidavit of what he will swear to must be produced, or its absence accounted for.....*Ibid.*

3. A new trial will not be granted to a plaintiff on the affidavit of a witness that he had forgotten, until after the trial, to mention a material fact invalidating one of the pleas.—*Duignan v. Wyatt et al.*.....385

## NONSUIT.

The Court is authorized by statute, in certain cases, to give a judgment as in case of a nonsuit; but a jury can not, in any case, find a verdict to that effect.—*The State v. Beem et al.*.....222

## NUL TIEL RECORD.

See SHERIFF, 2.

## O.

### OCCUPYING CLAIMANT.

1. The claim of an occupying claimant for the value of his improvements, on a recovery against him in ejectment, does not grow out of any common law right, but is entirely of statutory origin.—*Chesround v. Cunningham et al.*.....82

2. The defendant in trespass for *mesne* profits, after a recovery against him in ejectment, can not plead in bar of the action that the rents and profits, &c., do not exceed the value of his improvements, unless such value had been assessed under the direction of the Court that rendered judgment in the action of ejectment.....*Ibid.*

P.

PAROL AGREEMENT.

See AGREEMENT, 1, 2.

PAROL EVIDENCE.

See ATTACHMENT, 3; EVIDENCE, 3, 7.

PARTIES.

See CONSTABLE; FRAUDULENT CONVEYANCE, 4; WITNESS, 1, 3.

1. If one of two joint debtors die, the survivor may be sued for the debt; and if the survivor be insolvent, the estate of the deceased debtor is chargeable for the debt in equity. *Brown v. Benight et ux*.....39
2. An unincorporated company must sue in their individual names, and not in the name of the firm.—*Hays et al. v. Lanier et al.*.....322
3. A note was given to a private association for a debt due them, as follows: "I acknowledge myself indebted to the trustees of the *Springborough* school society in the sum of \$28.89, which I promise to pay unto *A. B.*, treasurer of said society, &c. *Held*, that a suit would not lie, on this note, in the name of the treasurer.—*Morrow v. Seaman*.....338
4. If a bond, payable "to the trustees or their successors in office," be the property of a congressional township, the suit on it must be in the corporate name of the township. *Johnson et al. v. Harris et al.*.....387

PARTNERSHIP.

See LARCENY, 1; PARTIES, 2; SET-OFF, 1-3.

1. If *A*, for a debt due to him from *B*, take a note executed by *B* in the name of the firm of *B & C*, without the knowledge of *C*, it is a fraud on *C*, and the note does not bind him; and if *D*, supposing from its face that the note has been duly executed by *B & C*, execute it with the intention of being their surety, it is also fraudulent and void as to him. *Hagar et al. v. Mounts*.....57
2. Same point decided.—*Hagar et al. v. Mounts*.....261
3. If a promissory note, executed by a partner in the name of the firm, be for his individual debt, which is known to the payee, it is not binding on the partnership.—*Taylor et al. v. Hillyer* .....433
4. A subsequent promise to pay such a note by the partner not bound by it,

is within the statute of frauds, and does not bind him.....*Ibid.*

5. The admissions of a partner, made after a dissolution of the partnership, and not relating to the previous business of the firm, are not admissible as evidence to charge the other partners.....*Ibid.*
6. A promissory note, executed by a partner in the name of the firm—he having previously retired from the partnership, and that fact being known to the payee—does not bind the other partners.....*Ibid.*
7. If the general issue be pleaded in an action of assumpsit against partners, the plaintiff must prove the partnership.—*Tomlinson et al. v. Collett et al.*.....436
8. Partners may be liable for goods purchased for them by their agent, although the agent, at the time of the contract, mention the name of only one of his principals.....*Ibid.*

PAYMENT.

See PLEADING, 16.

A bill in chancery was filed against the executors of a testator for money alleged to have been received by the deceased for the use of the complainant's ancestor. It appeared, by the evidence, that more than thirty years had elapsed since the receipt of the money. *Held*, that, so long a time having elapsed, payment of the demand should be presumed.—*O'Brien et al. v. Hoiland.*.....490

PENALTY.

See BOND, 8.

PERJURY.

See SLANDER, 2, 12.

PHYSICIAN.

A physician may maintain an action for his fees.—*Judah v. M'Namee*..269

PLEADING.

See ARBITRATION, 4, 5; BOND, 1, 2, 4, 7; CHANCERY, 2; CONTRACT, 1, 2; EXECUTORS AND ADMINISTRATORS, 5, 8, 12; FORCIBLE ENTRY AND DETAINER, 1, 2; HUSBAND AND WIFE, 2; INFANCY, 1, 2; INSTRUCTIONS TO JURY, 3; INTEREST, 4; JUSTICE OF THE PEACE, 2, 5, 7; MALICIOUS PROSECUTION, 5, 7, 11; MILITIA FINES, 1, 3; PRACTICE, 1-3, 6, 7; PRISON LIMITS; PRO-



CHEIN AMY; PROMISSORY NOTES, 3-8; REPLEVIN, 2; SET-OFF, 4; SHERIFF'S SALE, 4, 5; SLANDER, 1-4, 6, 7; TRESPASS, 6, 8-10.

1. Declaration in debt by an execution-plaintiff on a delivery-bond payable to the sheriff, conditioned for the delivery of the property on a certain day. Suggestion on the record that the bond is defective in not being made payable to the plaintiff. Breach, that the property was not delivered on the day specified in the condition, nor at any other time since the execution of the bond. *Held*, on general demurrer, that the declaration was good.—*Hawkins et al. v. Johnson*..... 46
2. A declaration in detinue may be objectionable on general demurrer, if it do not aver the value of the property; but the averment of value, in trespass or trover, or in suits on contracts for the delivery of property, is only matter of form.....*Ibid*.
3. If a special plea, denying the execution of a note on which the suit is founded, be not verified by affidavit as the statute requires, and the plaintiff make no objection to the plea on that ground, but go to trial on the merits, he is presumed to have waived the formality of the affidavit.—*Hagar et al. v. Mounts*. 57
4. The defense filed before the justice can not, on appeal, be amended in substance.—*Nelson v. Zink*.....101
5. A plea of performance generally to a declaration making negative averments in assigning breaches, is not sufficient.—*The State v. Leavell et al*.....117
6. Case for obstructing a navigable river to the plaintiff's injury, &c. The declaration averred that on, &c., at the county of *M*. (in which the suit was brought), the defendant built a dam across the east fork of *White* river, in said county, the said river being then and there a navigable stream. *Held*, that after verdict the declaration could not be objected to for not stating more explicitly that the river was a public highway.—*Tyrrell et al v. Lockhart* .....136
7. Debt on bond conditioned for the performance of certain work within a limited time. *Held*, that a plea of readiness to do the work, and of the plaintiff's refusal to permit its performance, should show that the refusal, &c., was before the expiration of the time for doing the work.—*Cox et al. v. Way*.....143
8. *Held*, also, that a plea in such case of an agreement to prolong the time, and of performance, &c., should show that the work was, within the enlarged time, performed, and accepted in discharge of the bond.....*Ibid*.
9. In a suit on a contract to deliver a certain number of hogs to the plaintiff, to be paid for on delivery, the declaration must aver a payment or tender of the purchase-money, or a readiness to receive and pay for the hogs.—*Chun et al. v. Howard et al*.....163
10. If a declaration contain one good count, a demurrer to the whole declaration must be overruled.—*Farnham v. Hay*.....167
11. To an action of debt on bond, the defendant may plead generally that the bond was obtained by fraud, covin and misrepresentation; but the evidence under this plea must be confined to the fraud of the obligee in relation to the execution of the bond.—*Huston et al. v. Williams*..170
12. A demurrer to the whole declaration containing more than one count can not be sustained if one count is good.—*Haworth v. Fisher*.....249
13. Under a special plea not sworn to, denying the execution of a note, the same evidence is admissible as if it were supported by oath, the plea not having been objected to at the proper time.—*Hagar et al. v. Mounts* .....261
14. If, in such case, there has been a trial before a justice, and another in the Circuit Court on appeal, without objection to the plea, the Circuit Court can not, on a new trial, reject the plea because it is not sworn to.....*Ibid*.
15. To an action on a bond for the performance of certain work within a specified time, a plea that the plaintiff made another contract with one of the obligors, after the date of the bond, for the doing of the same work, and thereby prolonged the time for doing the same, and that such obligor did the work within the enlarged time, to the plaintiff's satisfaction, is not a bar to the action.—*Cox et al. v. Way*.....328
16. A plea to an action of assumpsit that the defendant had paid the plaintiff the several sums in the



- declaration mentioned, with all interest due thereon, according to the form and effect of the promises in the declaration mentioned, in goods, wares, and merchandise, and money, can not be supported either as a plea of accord and satisfaction, or of payment, or of set-off, under the statute.—*Sinard v. Patterson*.....353
17. A plea to such an action that the contract between the parties, if any was made, was under seal, may be objected to on motion, or by special demurrer .....*Ibid*.
18. Leave to amend a defense, on an appeal from a justice of the peace, will not be granted by the Circuit Court, if the nature of the proposed defense be different from that relied on before the justice.—*Bastion v. Dalrymple* .....365
19. Debt on a collector's bond. Breaches assigned that the collector had failed to pay over to the treasurer of the county the taxes assessed thereon, or to account to him for the same, in the manner provided by law. *Held*, on special demurrer, that the breaches were insufficient.—*The State v. Evans et al*.....379
20. Suit before a justice on a note. Pleas, 1. That the defendant resided in a different township, &c.; 2. That the payee agreed to forbear to sue, &c.; 3. That another suit on the note was pending. *Held*, that these pleas were objectionable, but that the objections to them, made for the first time in the Circuit Court on appeal, came too late.—*McClelland v. Quarles*.....459
21. *Held*, that certain breaches assigned, in an action on a constable's bond, were sufficient, and that the conclusion to the country of a plea in the cause was wrong.—*Laughran v. Campbell et al*.....486
22. To an action of covenant for the non-delivery of hogs, worth a certain sum, by a specified time, &c., the defendant pleaded in bar that the hogs were set apart on, &c., and that the plaintiff failed to attend, &c. *Held*, that the plea should have stated the number of hogs so set apart, and, also, that they were left at the place for the plaintiff, or that they had always been, and still were ready to be delivered, &c.—*Dorman v. Elder*.....490
23. The defendant also pleaded in bar that before the covenant was to be performed the parties agreed that the defendant should, instead of the hogs, and at a time subsequent to that fixed for their delivery, deliver cattle, &c., that he had the cattle ready, and set them apart, &c., and had always kept them ready, &c., but that the plaintiff had never attended, &c. *Held*, that this plea was defective for not averring that the defendant would have complied with the first contract if the plaintiff had not prevented him, as mentioned in the plea.....*Ibid*.

## POWER OF ATTORNEY.

See WARRANT OF ATTORNEY.

## PRACTICE.

See EJECTMENT; EVIDENCE, 1, 2; JURY, 8; PRESUMPTIONS, 1; UNLAWFUL ASSEMBLY.

1. Three pleas in bar; issue in fact on the first plea, the second not noticed; replication to the third plea, demurrer to the replication, and judgment for the plaintiff. *Held*, that the second plea, and the issue on the first, should be disposed of before the plaintiff could have final judgment.—*Hanna et al. v. Ewing et al*..... 34
2. Two pleas to the action. Demurrer to the first plea sustained, and final judgment rendered thereon for the plaintiff. *Held*, that the judgment was erroneous, the second plea not being disposed of.—*Patterson v. Salmon* .....131
3. The defendant in replevin pleaded three pleas in bar; a replication to one of them was demurred to, and the demurrer overruled. *Held*, that whilst the other pleas were undisposed of, the plaintiff could not have final judgment.—*Fitch v. Dunn*.....142
4. After the plaintiff has closed his examination of testimony, and the defendant has asked the Court to instruct the jury relative to their verdict, it is too late for the defendant, except under special circumstances, to introduce any evidence.—*The State v. Beem et al*.....222
5. A cause being called on the first day of the term, the parties agreed that they had appointed the next day for trial, and, on the plaintiff's motion, the defendant was ruled to plead on the next day, he reserving the right to plead in abatement. *Held*, that these circumstances did not preclude the defendant from

- afterwards moving, on the day the rule was granted, to quash the writ.—*Shirley v. Hagar*.....225
6. If, in the Circuit Court, on an appeal from the judgment of a justice, the defendant file additional pleas without objection, the plaintiff can not assign the filing of those pleas for error.—*Tyler et al. v. Denson*.....347
7. Same point decided.—*Abel v. Burgett*.....502

## PRECEDENT CONDITION.

See CONDITION PRECEDENT.

## PRESUMPTIONS.

See ARBITRATION, 8; EVIDENCE, 6; INSTRUCTIONS TO JURY, 1, 2; JUSTICE OF THE PEACE, 3; PAYMENT.

1. Assumpsit before a justice of the peace. Declaration on a promise to deliver the plaintiff a hogshead of tobacco, with the money counts, but nothing said in the declaration as to any instrument of writing. Judgment for the plaintiff. The defendant appealed, and the justice sent up the declaration, and also a note purporting to be given by the defendant to the plaintiff for a hogshead of tobacco. Judgment on appeal for the appellee. *Held*, that this Court could not, under these circumstances, presume that the note was the cause of action, or that it was offered in evidence in the Court below. *Held*, also, that the judgment of the Circuit Court is presumed to be correct, unless the record show the contrary.—*Farley v. Smith*.....43
2. The dismissal of a cause by the Circuit Court, on motion, without any reason appearing on the record in favour of or against the dismissal, must be presumed to be correct.—*Ross v. Misner*.....362
3. An appellate Court must presume, the record showing nothing to the contrary, that the evidence in the Court below was sufficient to authorize the judgment.—*Ward et al. v. Crane et al.*.....393

## PRINCIPAL AND ACCESSORY.

See LARCENY, 2.

## PRINCIPAL AND AGENT.

See BOND, 3; PARTNERSHIP, 8.

1. An agent is not liable to a suit for money collected for his principal,

unless it have been previously demanded.—*Armstrong v. Smith*.....251

2. An action does not lie against an agent or factor for not accounting until after a demand to account.—*Judah v. Dyott*.....324
3. The statute of limitations in such action does not begin to run until a demand has been made.....*Ibid*.
4. *Quære*, whether in actions against agents or factors for not accounting, the contract should not be specially declared on?.....*Ibid*.
5. The declarations of an agent at the time of making a contract for his principal, may be proved to show the character in which the contract was made, but they are not evidence to prove the agency; nor are the agent's declarations, made subsequently to the contract, admissible as evidence for any purpose.—*Tomlinson et al. v. Collett et al.*.....436
6. In an action against the principal for the price of goods bought for him by an agent, the delivery of the goods to the agent may be proved, without calling him as a witness, or accounting for his absence.....*Ibid*.
7. A person whom a man puts in his place to transact his business of a particular kind, is a general agent; and such authority empowers the agent to bind the employer by all acts within the scope of his employment; and that power can not be limited by any private order or direction, not known to the party dealing with the agent.....*Ibid*.
8. The agent of a company of persons engaged in digging for salt water, who has the general superintendence of their works, may contract debts in their name which will be binding upon them, for such articles as may be suitable for the boarding and clothing of the hands employed at the works.....*Ibid*.

## PRINCIPAL AND SURETY.

1. *Scire facias* by the executors of A against B and C, to have execution against them on a replevin-bond executed by B with C his surety, and payable to the testator. Plea by C that the testator in his lifetime took out a *fieri facias* against the defendants on the bond, and placed it in the hands of the sheriff, but withdrew it without C's consent, before it was levied; that whilst the

- execution was in the sheriff's hands, *B* had sufficient property out of which the money could have been made, and that he afterwards became and still continued to be insolvent. *Held*, on demurrer, that the plea was insufficient.—*Naylor v. Moody et al.*..... 92
2. The mere delay of a creditor in not proceeding at law against the principal debtor, is no defense to a suit against the surety.....*Ibid.*

### PRISON LIMITS.

If a declaration on a bond for the prison limits set out the condition of the bond, it must aver the existence of the judgment and execution under which the bond was given.—*Martin et al. v. Kennard.* 430

### PROCHEIN AMY.

A declaration stating that the plaintiff sues by *prochein amy*, without showing the plaintiff's infancy, and the *prochein amy's* admission, is bad on general demurrer.—*Shirley v. Hagar*..... 225

### PRO CONFESSO.

See CHANCERY, 3. 4.

### PROMISSORY NOTES.

See CONTRACT, 1, 2; EXECUTORS AND ADMINISTRATORS, 10, 11; INTEREST, 2, 4; PARTIES, 3; PARTNERSHIP, 1-4, 6; PLEADING, 3, 13, 14, 20.

1. If the defendant, in an action on a note, rely on a plea of failure of consideration or of fraud, the *onus probandi* lies upon him.—*Towsey v. Shook*..... 267
2. If the alleged fraud, in such case, be in the sale of a patent-right for which the note was given, the fraud must be proved as in other cases .....*Ibid.*
3. A note for the payment of a certain sum annually, until certain deeds should be executed, is, under our statute, like a promissory note under the statute of *Anne*, a debt *per se*, and may be declared on without the averment of any consideration.—*Arnold v. Brown*..... 27
4. *Semble*, that a promissory note payable to a firm may be filed under the statute, instead of a formal declaration, if the writ contain the names of the partners.—*Hays et al. v. Lanier et al.*..... 322

5. To an action on a promissory note, the defendant pleaded in bar as to part of the amount that the consideration of that part was goods sold and delivered at a sound price, as good and saleable goods, which goods were damaged and of little or no value. *Held*, that the plea—containing no averment either of fraud or warranty—was insufficient.—*Phillips et al. v. Bradbury et al.*..... 358
6. If the defendant's plea, to an action on a promissory note, be a failure of consideration, and the plea be not proved, the plaintiff will recover.—*Alloway v. Sibert*..... 401
7. In an action on a promissory note brought by an assignee, the declaration should state the assignment to be made on the note under the hand of the assignor.—*Archer v. Spencer*..... 405
8. *Quere*, whether a promissory note not showing the maker's christian name, can be filed, under the statute, as a declaration; and, if it can, whether an explanation of the name should not appear in the writ?—*Thompson v. Coquillard*..... 437
9. If a promissory note be assigned to a third person, the payee cannot sue on it without showing, that, notwithstanding the assignment, it is his property .....*Ibid.*
10. If a note be payable to *A, B* cannot sue on it in his own name unless it be assigned to him.—*M'Clelland v. Quarles*..... 459

### PROSECUTING ATTORNEY.

See FEES.

### PURCHASER

See FRAUDULENT JUDGMENT; FRAUDULENT SALE; SALE; SHERIFF'S SALE; VENDOR AND PURCHASER.

### RECEIVING STOLEN GOODS.

An indictment for receiving stolen goods knowing them to be stolen, omitted to state that the defendant had received them *with intent to defraud the owner*; but it stated that he had *feloniously* received them, knowing, &c. *Held*, on motion in arrest of judgment, that the indictment was insufficient.—*Pelts v. The State*..... 28



## RECOGNIZANCE

See SCIRE FACIAS.

1. If a penal bond, taken by the sheriff for the defendant's appearance to an indictment, show on its face that it was signed and sealed in the presence of the sheriff and approved of by him, it is good as a recognizance; and the defect in its form, if any, is cured by the statute.—*Kearns v. The State*.....334
2. The rendering of judgment for the amount of a recognizance, at the time of declaring the same forfeited, is mere surplusage and cannot be assigned for error.....*Ibid.*

## RECORD.

See ARBITRATION, 8; CHANCERY, 6; EVIDENCE, 11; JURY, 4-7; PRESUMPTIONS.

## RELATOR.

See COSTS, 4; JUDGMENT.

## RELEASE.

See TRESPASS, 4.

## REMITTITUR.

If the only error complained of is, that the judgment for the plaintiff below is for too large a sum, he may cure the error by entering a *remittitur* in this Court for the surplus.—*Phillips et al. v. Nicholas*.....133

## RENT.

See DISTRESS.

## REPLEVIN.

1. If goods, seized by the marshal of an incorporated town by virtue of a legal precept, be unlawfully taken out of his possession, he can support an action of replevin for them against the wrong-doer.—*Fitch v. Dunn*.....142
2. A defendant in replevin pleaded, that at the time when, &c., he was a constable, &c.; that two executions dated on, &c., and issued by a justice of the peace, were directed to him as constable, &c.; that he levied these executions on the goods of *A*, which were the goods mentioned in the declaration, and were not the goods of the plaintiff; that the goods were taken to satisfy the said executions; that this is the trespass complained of; and that without

this he is not guilty. *Held*, that this plea, in not sufficiently describing the writs, and not stating that the plaintiff was the execution-defendant, is not a good plea in justification. *Held*, also, that the words in the plea—"without this that the defendant is not guilty"—neither constitute a special traverse, nor a distinct substantial defense. *Held*, also, that as a plea of property in a stranger, the plea is good, and that the other averments in it may be considered as surplusage.—*Parsley v. Huston*...348

3. If a defendant in replevin claim property and obtain a verdict, he is entitled to a return of the goods but not to damages: he is also in such case, by statute, entitled to costs.—*White v. Lloyd et al.*.....390

## REPORT.

See COMMISSIONER'S SALE.

## RIGHT OF PROPERTY, TRIAL OF.

See ATTACHMENT, 4; CHANCERY, 8.

One of the execution-plaintiffs, in the case of a trial of the right of property in the goods levied on, prayed an appeal, the others saying they would proceed no further. On the appeal, the cause was decided against the claimant, no objection being made as to parties. *Held*, that there was no error.—*Holcomb v. Johnson et al.*.....368

## S.

## SALE.

See FRAUDULENT JUDGMENT; FRAUDULENT SALE; SHERIFF'S SALE; VENDOR AND PURCHASER.

*A* being indebted to *B* in the sum of \$72, agreed to sell him a horse for \$45, or such sum as *C* should determine; and the horse was accordingly delivered to *B*, but *C* refused to fix the price. *B* kept the horse three days and offered him for sale, when he was levied on by virtue of an execution against *A*. *Held*, that the horse was not subject to the execution, the previous sale of him to *B* at \$45 being complete.—*Hollingsworth v. Bates*.....340



## SCIRE FACIAS.

See ESCAPE, 3; JUSTICE OF THE PEACE, 10.

1. If a person, recognized to appear in the Circuit Court to answer a criminal charge make default, and the recognizance be declared forfeited, a *scire facias* may issue against the cognizor without the entry of a judgment.—*Andress v. The State*. 108
2. A *scire facias* on a recognizance not taken in a court of record should show by whom it was taken and filed, and that the person who took and filed it was authorized to do so. *Ibid.*
3. Two returns of "not found" to a *scire facias*, like two returns of *nihil*, are equivalent to service.—*Kearns v. The State*..... 334
4. A *scire facias* on a recognizance taken out of court, must show that the recognizance was taken by a person legally authorized to take it; that it was duly acknowledged before him, and that it was filed and recorded in the proper court.—*Lang v. The State*..... 344

## SCROLL.

See SEAL.

## SEAL.

- A. instrument of writing executed with a scroll, instead of with a wafer or wax seal, is a sealed instrument. *Bradfield v. M'Cormick*..... 161

## SECURITY FOR COSTS.

See INFANCY, 2; WITNESS, 4.

- A. a motion for security for costs, founded on an affidavit under the statute of 1831, neither the examination of witnesses, nor supplementary or counter affidavits, are admissible.—*Scott v. Mortsinger*. 189

## SET-OFF.

See PLEADING, 16.

1. In a suit either at law or in equity against two partners, the individual demand of one of the defendants against the plaintiff is not a proper subject of set-off.—*Wasson v. Gould et al.*..... 18
2. The law of set-off applies only to debts which are liquidated and due in the same right.—*M'Kinney v. Bellows*..... 31
3. In an action brought by A against C for a debt due to A by C, the defendant can not set off a debt due to

him by A and B; and the circumstance that A and B are non-residents, and have no property within the State, makes no difference.—*Ibid.*

4. A, assignee of B, sued C on a promissory note given by the defendant to B for \$197.79. Plea of payment to B with notice of set-off. The plea shows that, at the date of the note, B owed C more than the amount of the note. Replication, that B was indebted to A in the sum of \$500, and had a quantity of furs worth \$800, a part of which, to the value of \$300, he was about to sell to A in part payment of the debt due him; that B and C then agreed, with A's consent, that C should buy the whole of the furs, and give in part payment his note to B for \$300, to be transferred by B to A without its being subject to the demands of C against B, and that C would pay the note to A; that the note in question was made and assigned in pursuance of that agreement. Held, on general demurrer, that the replication was good.—*Hanna et al. v. Ewing et al.*..... 34

## SHERIFF.

See ESCAPE; MILITIA FINES, 1-3; RECOGNIZANCE, 1; SHERIFF'S SALE.

1. Neither the insolvency of the execution-defendant, nor the statute of limitations, can be pleaded in bar to an action against a sheriff for a false return of a *fieri facias*.—*Stevens et al. v. Beckes*..... 88
2. In such an action, in the court that rendered the judgment, the minutes kept in a book by the clerk during the progress of the cause, and signed by the presiding judge conformably to the statute, are admissible evidence for the plaintiff on the issue of *nul tiel record*..... *Ibid.*
3. An execution-plaintiff can not recover on a sheriff's bond in the case of an escape, unless he shows a judgment against the execution-defendant.—*The State v. Beem et al.*..... 222

## SHERIFF'S SALE.

See FRAUDULENT JUDGMENT.

1. A purchaser of real estate at sheriff's sale obtains all the interest that the execution-debtor had in the property.—*Way et al. v. Lyon*..... 76
2. The purchaser at sheriff's sale of land, to which the execution-debtor had no title, but which belonged at

- the time to the *United States*, can recover from the debtor, in equity, the amount of the purchase-money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor.—*Muir v. Craig*.....293
3. A sheriff, by virtue of an execution on which about \$20 were due, sold 100 acres of land belonging to the execution-defendant, worth from \$1,000 to \$2,000, when four or five acres, which might have been conveniently taken from one side of the tract, could have been sold for a sufficient sum to satisfy the execution. *Held*, on a bill filed by the execution-debtor, that the sale was fraudulent and void.—*Reed et al v. Carter* .....376
4. In an action by a sheriff for the purchase-money of land sold by him on execution, the judgment and proceedings on which the execution issued must be averred in the declaration and proved on the trial. *Ennis v. Waller*.....472
5. In such an action, the sheriff's return to the execution must be stated in the declaration.....*Ibid*.
6. Sheriff's sales of real estate are within the statute of frauds.....*Ibid*.

## SLANDER.

See HUSBAND AND WIFE, 2.

1. A declaration in slander stated that the defendant, on a certain day, and at divers other days and times, spoke of the plaintiff certain slanderous words. *Held*, that the words, "and at divers other days and times," were surplusage, and not a ground of special demurrer.—*Cummins v. Butler* .....190
2. A count in slander stated that the defendant had spoken of and concerning the plaintiff these false and slanderous words, viz: *John Butler* (meaning the said plaintiff) swore a lie in the case of *Noah Anderson* against myself (meaning him, the said defendant, and referring to a suit previously determined in the *Pike Circuit Court*), and I (the said defendant meaning) can prove it. *Held*, that this was not a sufficient statement that the defendant had charged the plaintiff with perjury. ....*Ibid*.
3. If a count charge the defendant with speaking certain actionable words, and also other words not actionable, a demurrer to the whole count can not be sustained.....*Ibid*.
4. To an action of slander for charging the plaintiff with stealing hogs, it is not a good plea in bar that the plaintiff had stolen one hog.—*Swann v. Rary*.....298
5. The defendant can not prove, in such an action, that it was generally known in the neighborhood that there had been a quarrel between the parties.....*Ibid*.
6. To an action of slander for charging the plaintiff with having forged a certain instrument of writing, the truth was pleaded in justification. *Held*, that such a plea can not be objected to, because it avers the forged instrument to be in the plaintiff's possession or destroyed. *Held*, also, that in a plea with such an averment, the instrument need not be so particularly described, as would be otherwise required.—*Kent v. David*.....301
7. If one of the counts of the declaration, in such action, be for charging the plaintiff with forging an instrument of writing, a plea to the whole declaration, that the defendant uttered the forged instrument, &c., is insufficient.....*Ibid*.
8. Words charging the plaintiff, as postmaster, with taking money out of a letter put into the office by the defendant, and appropriating it to his own use, with keeping and embezzling letters, &c., are actionable. *Hays v. Allen*.....408
9. Such slanderous words, assuming that the plaintiff possessed the character in which he was defamed, operate as an admission, and are *prima facie* evidence of the fact.....*Ibid*.
10. Though the declaration in this case not only stated that the plaintiff was a postmaster, appointed and commissioned by the Postmaster General, but also that he had given bond and been sworn into office, it was held that his character of postmaster, if evidence of it could be required, was sufficiently established by proof of his commission, and of his acting in that capacity.....*Ibid*.
11. The evidence necessary to support an action of slander, for charging the plaintiff with burning a certain house, &c.—*M'Neal v. Woods*...485
12. In an action of slander for charging the plaintiff with committing perjury on a certain trial, a plea that

- the charge is true is not supported by proof that the plaintiff had sworn false on the trial, as to an immaterial point.—*M'Glemery v. Keller* .....488
13. Actionable words laid in a declaration in slander, spoken after the commencement of the suit, can not be proved in aggravation of damages.....*Ibid.*

STATUTE OF FRAUDS.

See FRAUDS, Statute of.

STATUTE OF LIMITATIONS.

See LIMITATIONS, Statute of.

SURETY.

See PRINCIPAL AND SURETY.

SURPLUSAGE.

See DECREE, 4; EXECUTORS AND ADMINISTRATORS, 11; RECOGNIZANCE, 2; REPLEVIN, 2; SLANDER, 1.

SURVIVOR.

See PARTIES, 1.

T.

TENANT.

See LANDLORD AND TENANT.

TENANTS IN COMMON.

One tenant in common may sue separately in ejectment for his undivided share of the estate.—*Chesround v. Cunningham et al.*..... 82

TIME.

See PAYMENT.

TRAVERSE.

See REPLEVIN, 2.

TRESPASS.

See COSTS, 1, 2; MALICIOUS PROSECUTION, 6, 11; MITTIMUS.

1. In trespass *quare clausum fregit*, the defendant can not, under the plea of not guilty, prove that the *locus in quo* was a highway, this defense requiring a special plea.—*Wood v. Mansell et al.*.....125
2. A bargainee, except in the case of an adverse possession, may recover in trespass *quare clausum fregit*, by proving property in the *locus in quo* without showing a previous possession.....*Ibid.*

3. Trespass against two persons for an assault and battery. One suffered judgment by default, against whom damages were assessed, and final judgment was rendered. Plea in bar by the other, issue to the country, and verdict and judgment against him. *Held*, that the taking separate judgments against the defendants, in such case, is error.—*Allen v. Whalley*.....332
4. The plaintiff in this case, on the trial of the issue, executed a release of the judgment against the other defendant, in order to render him a competent witness. *Held*, that the release discharged both the defendants.....*Ibid.*
5. The plaintiff may recover, in trespass for an assault and battery, on proof of an assault, without any evidence of special damage.—*Lewis v. Hoover*.....407
6. If, in trespass for false imprisonment against a magistrate, he plead, in justification, that the arrest, &c., was by virtue of a warrant issued by him against the plaintiff as the father of a bastard child, on the complaint of the overseers of the poor, and show that the child was not then born, or omit to state that the complaint was reduced to writing, or that the mother had failed to prosecute for the child's maintenance, or that the warrant was in due form, the plea is insufficient.—*Poult et al. v. Stocum*.....421
7. An action of trespass lies against a magistrate for an imprisonment by virtue of a warrant in such case, issued by him without a complaint authorizing it.....*Ibid.*
8. A constable, in his justification of an imprisonment under a magistrate's warrant, must show that the magistrate had jurisdiction of the subject-matter, and that the warrant, on its face, was legal.....*Ibid.*
9. If the magistrate who issues a warrant, and the officer who executes it, be sued in trespass by the party arrested, and join in a plea of justification, the plea must be a good defense as to both, or it is not good as to either.....*Ibid.*
10. Trespass for entering the plaintiff's close. Plea, that the defendant entered to take his corn growing there, which had been distrained by the plaintiff for rent due from a third person, but which corn, on a



trial of the right of property, had been adjudged to be the defendant's. *Held*, that the plea was insufficient.—*Chess v. Kelly et al.*.....438

### TROVER.

If the possession of property be fraudulently obtained from a bailee by the general owner, the bailee may maintain trover for the property against either the owner or his subsequent vendee.—*M'Connell v. Maxwell et al.*.....419

### U.

#### UNLAWFUL ASSEMBLY.

Indictment against eight persons for an *unlawful assembly*. Five of the defendants appeared and pleaded not guilty, and two of these five were found guilty, and three not guilty. *Held*, that judgment should be entered against the two found guilty, but that they must have been discharged had all the others indicted been tried and acquitted.—*The State v. Bailey et al.*.....209

#### USE AND OCCUPATION.

See JUSTICE OF THE PEACE, 7, 8.

### USURY.

See INTEREST, 3.

### V.

#### VARIANCE.

See BOND, 1, 2; MALICIOUS PROSECUTION, 8.

#### VENDOR AND PURCHASER.

See CONVEYANCE; FRAUDULENT CONVEYANCE; FRAUDULENT JUDGMENT; SALE; SHERIFF'S SALE; TRESPASS, 2.

1. *B* received from *A*, resident in *New York*, \$100, with a request to buy with the money a tract of land for *A*, in *Indiana*, to take the title in *A*'s name, and permit the son of *A* to occupy the land during *A*'s pleasure. *B* accordingly bought a tract of land for *A*, in this State, paid on it the money received from *A*, took an assignment to *A* of the certificate of purchase, and delivered the same

to him. The son occupied the land, and paid the further sum of \$110 of the purchase-money. *Held*, that this purchase must be considered as made for the father alone, that the legal and beneficial interest was vested in him, and that the land was not liable for the debts of the son.—*Brown v. Benight et ux.*..... 39

2. If, on a sale of real estate by heirs, the purchaser make a valid agreement, as a part of the consideration, to pay the debts of the ancestor, should there be a deficiency of assets, the remedy against him on the agreement is at law, and not in chancery.—*Pell v. Farquar.*.....331

### VERDICT.

See DETINUE; EXECUTORS AND ADMINISTRATORS, 5; FORCIBLE ENTRY AND DETAINER, 3; JURY, 1, 3 NONSUIT.

#### VOLUNTARY CONVEYANCE.

See CONVEYANCE, 4.

### W.

#### WARRANT OF ATTORNEY.

1. A warrant of attorney to confess judgment can not be expressly revoked.—*Eldridge v. Folwell et al.*..207
2. A warrant of attorney authorized the confession of judgment at a certain term, for a certain sum, in an action of debt, and the judgment was confessed accordingly. *Held*, that the judgment was not erroneous, merely because the nature of the debt was not particularly described in the warrant.....*Ibid.*

### WITNESS.

See EVIDENCE; NEW TRIAL, 2, 3.

1. Covenant against an administrator on an obligation of the intestate, brought by an assignee. Pleas, non-assignment by the obligee, and payment to him by the intestate. *Held*, that the defendant was not a competent witness against the plaintiff to prove the truth of the pleas.—*Sinks v. English.*.....138
2. In an action by a road commissioner on a bond, his predecessor, to whom the bond was given, not being interested, is a competent witness for the plaintiff.—*Cox et al. v. Way* .....143



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| <p>3. If, in an action of debt or assumpsit commenced before a justice of the peace, the cause of action be denied by plea, the plaintiff may, on the trial, either before the justice or on appeal, examine the defendant, under oath, as a witness, but the defendant is not bound, unless when thus under oath, to answer any questions in the cause.—<i>Hubble v. Hubble</i> .....205</p> <p>4. The surety for costs in a suit before a justice is not a competent witness</p> | <p>for the plaintiff on the trial of the cause on appeal.—<i>Craven v. Updyke</i> .....272</p> <p style="text-align: center;"><b>WRIT.</b></p> <p>See <b>EXECUTION</b>; <b>INFANCY</b>, 1; <b>PRACTICE</b>, 5.</p> <p>A <i>capias ad respondendum</i>, issued in vacation, must be returnable to the first day of the next term of the Court: if a term intervene between the date and return, the writ is void.—<i>Shirley v. Hagar</i>.....225</p> |
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